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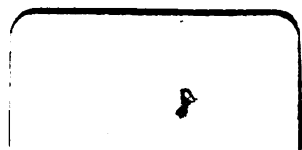
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SUPPLEMENT
TO
THE LAW
OF
MECHANICS' LIENS
UPON REAL PROPERTY
OF THE
STATE OF CALIFORNIA
BY
FRANK JAMES
Of the Los Angeles Bar

**INCLUDING ALL AMENDMENTS TO THE MECHANICS' LIEN
LAW OF CALIFORNIA AND ALL DECISIONS
OF THE SUPREME COURT,
TO DECEMBER, 1901**

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
LAW PUBLISHERS AND LAW BOOKSELLERS
1902

ABANDONMENT. See Notice to Owner.

Where contractor abandons the contract before completion of the work, the owner's liability to lien-claimants is fixed by section 1200 of the Code of Civil Procedure.

McDonald v. Hayes, 132 Cal. 490; 64 P. 850.

What sufficient finding of; cessation of labor for thirty days, effect

Section 1183½ of the C. C. P.

Section 1. A new section is hereby added to the Code of Civil Procedure, to be numbered section eleven hundred and eighty-three and one-half, as follows:

1183½. Whenever such contract refers to plans and specifications in accordance with which the work is to be done, it shall be void unless such plans and specifications be completed and signed by the parties to the contract at the time of the execution thereof, and include detail drawings sufficient to show the materials, form and dimensions of the proposed work, and upon a scale of at least one and one-half inches to the foot. Any provision in such contract leaving to the architect or other person the power to determine what materials shall be furnished or work done shall be void, except in so far as the same leaves to such architect or person the discretion to determine whether such work and materials are in accordance with the contract, plans, specifications and details.

Building contracts, what provisions must contain.

Sec. 2. This act shall take effect from and after its passage.

[Approved March 28, 1901.]

Estimate of work by, effect of as against assignee of price.
Long Beach S. D. v. Lutge, 62 P. 36.

ASSIGNMENT.

Order given by board of school directors to contractor is assignable.

Long Beach S. D. v. Lutge, 62 P. 36.

ABANDONMENT. See Notice to Owner.

Where contractor abandons the contract before completion of the work, the owner's liability to lien-claimants is fixed by section 1200 of the Code of Civil Procedure.

McDonald v. Hayes, 132 Cal. 490; 64 P. 850.

What sufficient finding of; cessation of labor for thirty days, effect of; proof of liability under section 1200. *Id.*

ADMINISTRATOR. See Executor.

AGENCY. See Contract; Findings; Pleadings.

AMENDMENT. See New Section 1183½ Code of Civil Procedure, Stat. 1901, page 817, page 1 this supplement, requiring plans and specifications to be completed, signed by the parties and include detail drawings.

The Code Commissioners' amendments of sections 1183, 1184, 1191, 1196 and 1203 of the Code of Civil Procedure (Stat. 1901, pp. 188-190) are unconstitutional.

Lewis v. Dunne, 66 P. 478.

Of 1887 to section 1191 of the C. C. P. did not repeal the section as it stood prior thereto.

Santa Cruz, etc. Co. v. Lyons, 65 P. 329.

ARBITRATION.

Under the contract stated arbitration held a condition precedent to right to maintain action.

Gray v. French Society, 131 Cal. 566; 63 P. 848.

Tally v. Parsons, 131 Cal. 516; 63 P. 833.

ARCHITECT.

See New Section 1183½ C. C. P. (Stat. 1901, p. 817), page 1 this supplement, providing that any provision in contract leaving to the architect or other person the power to determine what materials shall be furnished or work done, shall be void except in so far as the same leaves to him the discretion to determine whether such work and materials are in accordance with the contract, plans, specifications and details.

Certificate of, when must be obtained. See Arbitration.

Abandonment of contract; discharge of architect, see

Tally v. Parsons, 131 Cal. 516; 63 P. 833.

For extra work, see

Gray v. French Society, 131 Cal. 566; 63 P. 848.

Estimate of work by, effect of as against assignee of price.

Long Beach S. D. v. Lutge, 62 P. 36.

ASSIGNMENT.

Order given by board of school directors to contractor is assignable.

Long Beach S. D. v. Lutge, 62 P. 36.

Notice of claims of materialmen after assignment, effect of. *Id.*
 Right of action for damages under section 1203 of the C. C. P. is assignable.

Gibbs v. Tally, 63 P. 168, reversed on constitutional grounds in S. C., 65 P. 970.

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Perkins v. West Coast L. Co., 129 Cal. 427 ; 62 P. 57.

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Williams v. Gaston, 127 Cal. 641 ; 60 P. 427.

BOND—SURETIES. See Constitutional Law.

Section 1203 of the C. C. P. is unconstitutional, reversing

Gibbs v. Tally, 63 P. 168, and overruling *Mangrum v. Truesdale* and *Carpenter v. Furrey*, cited *infra*.

Gibbs v. Tally, 65 P. 970.

Sureties not bound beyond strict letter of the bond, and one conditioned for labor and materials does not cover money advanced for same.

Canenasso v. Antonelle, 127 Cal. 382 ; 59 P. 765.

Sureties have right to stand upon the precise terms of the bond.

Tally v. Parsons, 131 Cal. 516 ; 63 P. 833.

Under section 1203 of the C. C. P., bond must be filed for record with contract and if not filed no action can be had thereon but materialmen and laborers have a remedy under that section against the owner and contractor for damages.

Mangrum v. Truesdale, 128 Cal. 145 ; 60 P. 775.

Action against sureties on bond under section 1203 C. C. P. may be maintained immediately upon default, without previous demand or notice ; notice of acceptance not necessary ; section 1203 C. C. P. not unconstitutional on any of the grounds stated ; effect of failure of sureties to justify.

Carpenter v. Furrey, 128 Cal. 665 ; 61 P. 369.

For construction of school-house ; validity of ; common law bond.

Union S. M. Works v. Dodge, 129 Cal. 390 ; 62 P. 41.

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Long Beach S. D. v. Lutge, 62 P. 36.

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Tally v. Parsons, 131 Cal. 516 ; 63 P. 833.

Surety not liable to obligee who pays invalid lien claim.

Brill v. De Turk, 130 Cal. 241 ; 62 P. 462.

Surety on bond of contractor given to owner is not entitled to enforce his lien for materials, though owner has made premature payments.

Ganahl *v.* Weir, 130 Cal. 237 ; 62 P. 512.

CESSATION of work. See Abandonment.

CLAIM OF LIEN.

Where original contract is void claim of lien may state name of owner or contractor as person by whom claimant was employed.

McLain *v.* Hutton, 131 Cal. 132 ; 63 P. 182, S. C., 61 P. 273.

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If no time of payment be stated in, principle of law is that no time was given.

McLain *v.* Hutton, *supra*

Bryan *v.* Abbott, 131 Cal 222 ; 63 P. 363.

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McLain *v.* Hutton, *supra*.

Not invalidated by statement that A and F are the owners and reputed owners though as a fact F has no interest in the property.

McLain *v.* Hutton, *supra*.

What is sufficient description of property in.

McLain *v.* Hutton, *supra*.

Of materialman must be filed within 120 days after cessation of work for 30 days though owner fails to file notice of cessation.

Buell *v.* Brown, 131 Cal. 158 ; 63 P. 167.

Naming the real owner as the reputed owner is sufficient.

Bryan *v.* Abbott, *supra*.

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Santa Cruz etc. Co. *v.* Lyons, 65 P. 329.

Recovery can be had only on contract stated in.

San Francisco Pav. Co. *v.* Fairfield, 66 P. 255.

COMPOSITION AGREEMENT. See Waiver of Lien.

CONSTITUTIONAL LAW.

Section 1203 of the C. C. P. is not unconstitutional upon the grounds stated in Carpenter *v.* Furrey, 128 Cal. 665 ; 61 P. 369, and in Mangrum *v.* Truesdale, 128 Cal. 145 ; 60 P. 775, but that section is unconstitutional in that it attempts to compel the owner to furnish security in a matter in which he is not a party and deprives him of his property by interfering with its use in a case where his building contract is valid and he has

paid the full price thereof in accordance with the terms of such contract.

Gibbs v. Tally, 65 P. 970, reversing S. C. 63 P. 168.

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Lien-claimant must bring himself strictly within the lien law.

Reese v. Bald Mountain, etc. Co., 65 P. 578.

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Provisions in leaving to the architect or other person the power to determine what materials shall be furnished or work done shall be void, except in so far as the same leave to such architect or person the discretion to determine whether such work and materials are in accordance with the contract, plans, specifications and details.

Section 1183½, *Id.*

Provision in that bills will be paid on demand provided said bills do not exceed seventy-five per cent of the value of the materials and labor employed, is sufficient under section 1184 of the C. C. P. *Brill v. De Turk*, 130 Cal. 241; 62 P. 462.

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Ganahl v. Weir, 130 Cal. 237; 62 P. 512.

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Gray v. French Society, 131 Cal. 566; 63 P. 848.

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Santa Cruz, etc. Co. v. Lyons, 65 P. 329.

The provisions of section 1184 of the C. C. P. with reference to payments have no application to a case where the contract price is less than \$1000, and hence where the owner, under such a contract, has paid an amount not yet due to the contractor, the owner is not liable to a materialman as on a premature payment. Nor, in such case, does the fact that the owner voluntarily paid a hardware bill arising in the course of the construction of the building—the bill being in excess of the contract price of the building—prejudice a materialman furnishing materials to the contractor.

Southern Cal. L. Co. v. Jones, 65 P. 378.

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McLain *v.* Hutton, 131 Cal. 132; 63 P. 182.

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See "Contract," *supra*, for statute.

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Blinn L. Co. *v.* Walker, 129 Cal. 62; 61 P. 664.

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San Francisco Pav. Co. *v.* Fairfield, 66 P. 255.

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Union S. M. Wks. *v.* Dodge, 129 Cal. 390; 62 P. 41.

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Gibbs *v.* Tally, 63 P. 168, S. C. 65 P. 970.

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Georges *v.* Kessler, 131 Cal. 183; 63 P. 466.

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McDonald *v.* Hayes, 132 Cal. 491; 64 P. 850.

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Reese *v.* Bald Mountain etc. Co., 65 P. 578.

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Chappius *v.* Blankman, 128 Cal. 362; 60 P. 925.

San Francisco Pav. Co. *v.* Fairfield, 66 P. 255.

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Gray *v.* French Society, 131 Cal. 566; 63 P. 848.

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McLain *v.* Hutton, 131 Cal. 132; 63 P. 182.

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Georges *v.* Kessler, 131 Cal. 183; 63 P. 466.

Schroeder *v.* Pissis, 128 Cal. 209; 60 P. 758.

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Union S. M. Wks. *v.* Dodge, 129 Cal. 390; 62 P. 41.

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Buell *v.* Brown, 131 Cal. 158; 63 P. 167.

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Reese *v.* Bald Mountain etc. Co., 65 P. 578.

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Gibbs *v.* Tally, 63 P. 168, S. C. 65 P. 970.

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McLain *v.* Hutton, 131 Cal. 132; 63 P. 182, S. C. 61 P. 273.

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Schroeder *v.* Pissis, 128 Cal. 209; 60 P. 758.

MATERIALS.

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Weatherly *v.* Van Wyck, 128 Cal. 329; 60 P. 846.

Claimant who furnishes cement for sidewalk constructed in connection with building as a part thereof, is entitled to a lien on the building therefor.

McLain *v.* Hutton, 131 Cal. 132; 63 P. 182, S. C. 61 P. 273.

Furnished for different buildings, effect of failure to segregate. *Id.*

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What sufficient as; copies of contract, plans, etc., filed as; not required to be signed by parties.

Blinn L. Co. *v.* Walker, 129 Cal. 62; 61 P. 664.

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Southern Cal. L. Co. *v.* Jones, 65 P. 378.

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Reese *v.* Bald Mountain etc. Co., 65 P. 578-9.

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McLain *v.* Hutton, 131 Cal. 132; 63 P. 182.

For work on mine.

Chappius *v.* Blankman, 128 Cal. 362; 60 P. 925.

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Reese *v.* Bald Mountain etc. Co., 65 P. 578.

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Carpenter *v.* Furrey, 128 Cal. 665; 61 P. 369.

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Ganahl *v.* Weir, 130 Cal. 237; 62 P. 512.

Allegation of nonpayment necessary.

Gibbs *v.* Tally, 63 P. 168, S. C. 65 P. 970.

What sufficient description of property.

Bryan *v.* Abbott, 131 Cal. 222; 63 P. 363.

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Georges *v.* Kessler, 131 Cal. 183; 63 P. 466.

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Gray *v.* French Society, 131 Cal. 566; 63 P. 848.

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Bryan *v.* Abbott, *supra*.

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Georges *v.* Kessler, *supra*.

Allegation of agency necessary, when.

Reese *v.* Bald Mountain etc. Co., 65 P. 578.

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Notice under section 1184 C. C. P. to withhold payment is not necessary to recover for.

Ganahl *v.* Weir, 130 Cal. 237; 62 P. 512.

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McLain *v.* Hutton, 131 Cal. 132; 63 P. 182, S. C. 61 P. 273.

Under section 1203 C. C. P. as between lien claimants.

Gibbs *v.* Tally, 63 P. 168 reversed by S. C. 65 P. 970 on constitutional grounds.

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School district; failure of contractor to complete building, effect of.

Long Beach S. D. *v.* Lutge, 62 P. 36.

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Bryan v. Abbott, 131 Cal. 222; 63 P. 363.

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Chappius v. Blankman, 128 Cal. 362; 60 P. 925.

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As to statement of rate of interest.

McLain v. Hutton, 131 Cal. 132; 63 P. 182, S. C. 61 P. 273.

Between claim of lien and findings as to agreed price and reasonable value, and also between contract and claim of lien as to terms of contract. *Id.*

Between claim of lien and contract as to market rates and fixed price.

Buell v. Brown, 131 Cal. 158; 63 P. 167.

Objection to evidence on ground of must point out wherein variance exists.

Georges v. Kessler, 131 Cal. 183; 63 P. 466.

Recovery can be had only on contract stated in claim of lien.

San Francisco Pav. Co. v. Fairfield, 66 P. 255.

VOID CONTRACT.

Contractor cannot merely as statutory agent of the owner render the owner personally liable to subcontractors or materialmen.

McLain v. Hutton, 131 Cal. 132; 63 P. 182, S. C. 61 P. 273.

When section 1183 C. C. P. declares that the contract required to be recorded shall be wholly void if not recorded, it means that it shall be wholly void as to subcontractors, materialmen and laborers, but as between the owner and the contractor the contract remains, not as the basis of recovery, but as the measure and test of the right of the contractor to recover against the owner. The contractor must show a substantial compliance with the terms of the contract to warrant any recovery at all, and the measure of his recovery even under implied assumpsit, must be limited as to him by the contract price. The contract is available as evidence to show that the work has not been performed in substantial compliance with its terms, and when such contract was drawn by the contractor, any ambiguity in its terms must be construed most strictly against him.

Laidlaw v. Marye, 65 P. 391.

WAIVER OF LIEN. See Notice to Owner.

Composition agreement between contractor and lien-claimants, see *Schroeder v. Pissis*, 128 Cal. 209; 60 P. 758.

THE LAW
OF
MECHANICS' LIENS
UPON REAL PROPERTY
IN THE
STATE OF CALIFORNIA

WITH AN APPENDIX OF FORMS

BY FRANK JAMES
Of the Los Angeles Bar

IN ONE VOLUME
1900

WITH SUPPLEMENT, CONTAINING NEW LAW
AND DECISIONS TO DECEMBER, 1901

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
LAW PUBLISHERS AND LAW BOOKSELLERS
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Entered according to Act of Congress, in the year 1901.

By FRANK JAMES,

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PREFACE.

The design of the author in writing this book has been to collate the statutes, and the decisions of the courts, of California relating to the liens of mechanics and others upon real property, and to make such comments and to give such explanations as seemed to be necessary for a clear and comprehensive understanding of the present law. It is intended to be a book of ready reference for use by practicing lawyers rather than a labored essay for the entertainment of the literati of the profession. Keeping these purposes constantly in view, the inviting fields of speculation have been shunned and the splendid opportunities for learned disquisitions upon constitutional law have been passed unnoticed. The book shows the law as it is, and the legislative department of our government has not been invaded by the author's royal prerogative of decreeing for all time what the law ought to be.

The need of such a work is known to every lawyer who has had occasion to draft a building contract or a claim of lien, or who has found it necessary to construe the provisions of the lien law.

The legislature has, from time to time, passed no less than six lien acts besides numerous amendments to each, and while these acts have a general resemblance, they vary sufficiently in detail to render the decisions of the courts construing the earlier acts, of doubtful, and often of no, value, as guides to the interpretation of the provisions of the present law.

The present law has been evolved largely from the earlier lien laws of this state. To ascertain which of the provisions of the present law are new enactments and which of them have been copied from the earlier acts, is a laborious task. The means are at hand, but the busy lawyer has not always the time, and if he has the time, has not always the patience, to trace the history of a certain clause of the statute of doubtful construction, through volumes of sessions laws, to secure the necessary information whereby to determine the true intent of the law-makers in its enactment.

The decisions of the courts are not always clear, and if clear, are not always in harmony with the earlier decisions of the same court.

It may be roughly estimated that there are four hundred decisions of the Supreme Court of California bearing upon liens of mechanics and others. These decisions are scattered through many volumes of reports. There are numerous decisions upon important matters not reported in the California reports and which, therefore, for all practical purposes, have been lost to the practitioner.

Hitherto no thorough or systematic attempt has been made to bring these decisions together in the form of an index, or of a special digest, or of annotations of the statute.

Judging from the number of suits which have been brought to foreclose liens of mechanics, it is safe to say that there is no subject of legislation in the State of California of greater importance than that of mechanics' liens. The rapidly increasing population of California, the steady growth of her vast and varied industries, the inexhaustible resources of her productive soil, all clearly and unmistakably point to a long and continued activity in the building trades hitherto

unknown in her history, and afford ground for belief that the law of mechanics' liens will always be a matter of considerable moment to owners of property, to lien-claimants, to the people at large, and especially to the members of the profession.

Notwithstanding the prominent place which the lien law has assumed in the courts of the state, and that nearly every form of construction of buildings, structures and improvements known to the building trades, comes within its provisions, yet, if the statements of members of the profession be accepted as proof of the fact, there is no statute of the state so imperfectly understood. This lack of knowledge can be accounted for only on the theory that the statutes, and the decisions of the courts thereon, have not been presented to the profession in such form as to facilitate their study.

This volume has not been compiled in ignorance of the fact that there are excellent treatises upon the general subject of mechanics' liens. These treatises, however, cover a wide field. They group together the decisions of the several states from the principles of which general rules are formulated, but the practitioner is left to determine for himself the application of these general rules to the statute of his state. These treatises supply guides, but they rarely furnish precedents. This is not a fault attributable to the authors of these treatises. Nor is it a defect in their compilation. The difficulty lies in the subject matter.

Mechanic-lien laws are statutory creations. They were, therefore, unknown at common-law, the source from which has been drawn the substantive law of the United States. This common origin explains the close resemblance of such substantive law in the several states, and this close resem-

blance may be seen in the law of real property found in the statutes and in the decisions of the courts of those states, and which is no other than the common-law of England modified and adapted to meet the conditions of a new country of advancing civilization, and of a soil kept free from feudal tenures and entails.

But in the enactment of mechanic-lien laws, there has never been a common source from which to draw, nor a recognized precedent to follow. The result is that the lien laws of the several states have few resemblances and many differences, and that any attempt to treat all of them, in a general work, must necessarily be attended with difficulties and uncertainties both with reference to the rules laid down by the author, and to the value of the decisions which are cited to illustrate those rules.

It was this consideration, among others, which induced the author to undertake the compilation of this volume.

In arrangement, the statute has been followed as closely as logical treatment would permit. Each of the general divisions of the subject has been given a separate chapter, and each provision of the statute falling within a chapter has been given a separate section. The advantages of this plan are manifold. It brings together in one section the statute and the decisions, exhibits the statute in the light of judicial exposition, and illustrates it by the practical, yet authoritative, application of its provisions to the facts of particular cases.

Nor are these all the advantages of this plan. If the decisions are conflicting, the attention of the reader is called to this fact either in the text or in the notes. The history of the statutory provisions is set forth. The value of the decisions upon former statutes is pointed out, and their

worth, as guides to the interpretation of the present law, is noted. In fine, the aim has been to make every section complete in itself. This has necessitated repetition, and has transgressed the rules of the essayist, but the author believes the profession is more concerned in having all of the law upon a given point presented, than it is in having, as a substitute, scientific arrangement and studied brevity.

Especial attention is called to the lien law of California as presented in chapter I. By means of figures, brackets and notes, the history or, more properly, the evolution, of each section of that law is shown at a glance. Taking as a basis, or starting point, when possible, the lien law as it was enacted upon the adoption of the Code of Civil Procedure in 1872, the practitioner has pointed out to him every amendment since made to each section of the law. This includes not only the matter which has been added, but, also, the matter which has been stricken out, by amendment.

Throughout the work several decisions of the Superior Court have been cited as authorities upon points concerning which the decisions of the Supreme Court are silent.

For the convenience of the profession, an appendix of forms has been added.

The author is greatly indebted to Hon. Lucien Shaw, Presiding Judge of the Superior Court of Los Angeles County, to Sheldon Borden, Esq., and J. W. Swanwick, Esq., of the Los Angeles Bar, for many valuable suggestions made by them during the preparation of this work, and especially to Judge Shaw for the form of claim of lien, and to Sheldon Borden, Esq., for the forms of complaint and decree, all of which will be found in the Appendix of Forms.

F. J.

Los Angeles, California, March 1900.



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- 17 Section 1199 of the C. C. P.
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- 19 Section 1201 of the C. C. P.
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- 21 Section 1203 of the C. C. P.
- 22 Act of 1897 (stat. 1897, 201) to secure Payment of Claims of Materialmen and others employed by contractors upon Public Work.
- 22a Amendment of Street Improvement Act of 1885. (stat. 1899, 23) to secure Payment of Claims of Laborers, and others for Street and Sewer work in Municipalities.

Section 1183 of the C. C. P.

Section 1. (§1183 C.C.P.) Mechanics, material-^{Persons entitled to liens.} men, [85] *contractors, subcontractors* [85], artisans, architects, [85] *machinists, builders, miners, and all persons* [85] and laborers of every class, performing labor upon or furnishing materials to be used in the construction, alteration [87], addition to [87], or repair, [85] *either in whole or in part* [85], of any [a] building, wharf, bridge, ditch, flume, aqueduct, [99] well [99], tunnel, fence, machinery, rail-^{Work and materials lienable.} road, wagon road, or other structure, shall have ^{Property subject to lien.}

a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished [b, 85] *whether at the instance of the owner or of any other person acting by his authority, or under him, as contractor or otherwise; and any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building, or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, [87] addition to [87], or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this chapter.*

Agent of
the owner.

Mining
claims.

Who is
agent of
owner.

Original
contract,
lien of.

When
contract
must be in
writing,
and
subscribed
by parties.

Memoran-
dum may be
filed.
Contents of.

In case of a contract for the work between, the [87] reputed [87] owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor. All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and [87] the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable [87],

shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing; otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and, in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. [85]

Contract or Memorandum may be filed. Time and place of filing.

Fee for filing contract.

When contract void. Effect of.

NOTES TO SECTION 1183.

Section 1183½ of the C. C. P.

Section 1. A new section is hereby added to the Code of Civil Procedure, to be numbered section eleven hundred and eighty-three and one-half, as follows:

1183½. Whenever such contract refers to plans and specifications in accordance with which the work is to be done, it shall be void unless such plans and specifications be completed and signed by the parties to the contract at the time of the execution thereof, and include detail drawings sufficient to show the materials, form and dimensions of the proposed work, and upon a scale of at least one and one-half inches to the foot. Any provision in such contract leaving to the architect or other person the power to determine what materials shall be furnished or work done shall be void, except in so far as the same leaves to such architect or person the discretion to determine whether such work and materials are in accordance with the contract, plans, specifications and details.

Building contracts, what provisions must contain.

Sec. 2. This act shall take effect from and after its passage.

[Approved March 28, 1901.]

a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished [b, 85] *whether at the instance of the owner or of any other person acting by his authority, or under him, as contractor or otherwise; and any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the build-*

Agent of
the owner.

Mining
claims.

shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing; otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and, in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. [85]

Contract or Memorandum may be filed. Time and place of filing.

Fee for filing contract.

When contract void. Effect of.

NOTES TO SECTION 1183.

1. The matter between brackets enclosing the same figures was added to the section by the amendment of the year indicated by the figures in the brackets, thus: "[87] addition to [87]" is intended to show that by the amendment made to this section in the year 1887, the words "addition to" were added.

For convenience, the amendments of 1885 are printed in italics.

2. The amendments of 1885 (stat. 1885, 143) took effect May 17, 1885; those of 1887 (stat. 1887, 152) March 15, 1887; that of 1899 (stat. 1899, 33) May 1, 1899.

3. By the amendment of 1885 the following matter was stricken from section 1183:

At the place indicated by the letter "[a]", "mining claim".

At the place indicated by the letter "[b]":

"This lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party."

The clause last quoted was added to section 1183 by the amendment thereto of 1880 (amds. 1880, C. C. P., 63). This clause had the effect, as was said in *Latson v. Nelson* 11 Pac. C. L. J. 589, to enlarge and extend the provisions of section 15, article XX of the constitution of 1879, in that it made the owner liable beyond the terms and limit of his valid contract. The legislature had not such power and it was accordingly held that the clause was unconstitutional.

4. Section 1183 and the statutes from which it was taken have undergone many changes both with reference to the persons to whom liens have been given and to the property which has been made subject to liens. For the early statutes covering these subject matters, see sec. 1 act of 1850, 211 (1850-3, 808); sec. 1 of act of 1853 (stat. 1850-3, 811); sec. 1 of the act of 1855, 156; sec. 1 of the act of 1856, 203; sec. 1 of the act of 1857, 84; secs. 1, 2, 3, 9 and 17 of act of 1862, 384; secs. 1 and 14 of act of 1868, 589; sec. 1183 of the C. C. P. as originally adopted in 1872 and as amended in 1873-4, 106. Section 1183 as above shown is built upon the amendment of 1880, 63.

5. For decisions of the court and comments upon the various matters contained in this section, see chap. IV, sec. 66 *et seq.*, which treats of persons entitled to liens; chap. V, sec. 84 *et seq.*, work and materials which are lienable; chap. VI, sec. 92 *et seq.*, property subject to lien; chap. VII, sec. 129 *et seq.*, agency and persons who may subject property to lien; and chap. VIII, sec. 142 *et seq.*, contracts.

6. The lien law of California now comprises sections 1183 to 1203 both inclusive and is known and often referred to as chapter II, title IV, part III of the O. O. P.

Section 1184 of the G. C. P.

Sec. 2. (§1184 C.C.P.) No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; **PRO-**
VIDED, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the [a] contract.

Premature payments. Effect of on lien. No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the [87] *reputed* [87] owner in any amount for damages or otherwise, for non-performance of his contract or otherwise.

Contract price payable in money only, and not diminished by offset, etc. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counter-claim, in favor of the [87] *reputed* [87] owner, and against the contractor; no alteration of any such contract shall affect any lien acquired under the provisions of this chapter.

[b, 87] *In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof.* [87]

Alteration
of contract.
Effect of on
lien.

Effect of
violation of
this section.

Any of the persons mentioned in section 1183, except the contractor, may at any time give to the [87] *reputed* [87] owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the [87] *reputed* [87] owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. Such notice may be given by delivering the same to the [87] *reputed* [87] owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the mining claim [c, 87] *or improvement*. [87] No such notice shall

Notice by
claimant
to owner of
work done
or materials
furnished.
Contents of.

Notice, how
given.

be invalid by reason of any defect of form, provided, it is sufficient to inform the [87] *reputed* [87] owner of the substantial matters herein provided for, [87] *or to put him upon inquiry as to such matters*. [87] Upon such notice being given, it shall be the duty of the [d, 87] *person who contracted with the contractor* [87] to, and he shall withhold from his contractor, or from any person acting under such [87] *reputed* [87] owner, and to whom by said notice the said labor or materials, or both, have been furnished, or

Notice,
when
invalid.

Duty of
owner upon
receiving
notice.

Amount
including
counsel fees
and costs
to be
withheld.

agreed to be furnished [e, 87] *sufficient* [87] money due, or that may become due to such contractor, or other person, [f] to answer such claim and any lien that may be filed therefor for record, under this chapter, including [g, 87] *counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter.* [87]

NOTES TO SECTION 1184.

1. For explanation of brackets and figures, see note 1 to section 1183, *supra*. For convenience the amendments of 1887 are printed in italics.

2. Section 1184 was enacted as a new section in 1885 (stat. 1885, 144). Prior to the enactment of this section, service of notice on the owner did not impose upon him the duty of retaining a portion of the price to satisfy any lien which the person giving the notice might subsequently file. (*McCants v. Bush*, 70 Cal. 125, 11 P. 601.) The original of this section is now section 1191. Section 1185 as enacted in 1885 took effect May 17, 1885; the amendment to this section in 1887, (stat. 1887, 153) took effect March 15, 1887.

3. By the amendment of 1887 the following matter indicated by letters in brackets in the text was stricken from the section as it stood under the amendment of 1885:

[a] "work and";

[b] "All such contract and alterations thereof as do not conform substantially to the provisions of this section, shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

[c] "building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure." "Improvement" substituted therefor.

[d] "owner." "Person who contracted with the contractor", substituted therefor.

[e] "all." "sufficient" substituted therefor.

[f] "or sufficient of such money."

[g] "Costs and counsel fees provided for in this chapter, until such notice is by writing withdrawn; and all money paid thereafter by the owner to the contractor, or such other person, while such notice is in force, shall, for the purposes of all liens of all persons, except the contractor, be deemed a payment prior to the time the same was due within the meaning of and subject to the provisions of this section." (See chap. XV, sec 452, *infra*).

4. For the early statute as to payment of the price, see secs. 5 and 10 Act of 1862, 384; and as to notice by claimant to owner, see secs. 2 and 3 of act of 1850, 211; secs. 3 and 4 of act of 1855, 156; secs. 2 and 3 of act of 1856, 203; secs. 2 and 3 of act of 1858, 225; secs. 5, 8 and 12 of act of 1862, 384. The statute of 1868, 589 as well as the lien law enacted upon the adoption of the C. C. P. in 1872 and the amendments thereto in 1873-4, are silent upon both of these subjects. Section 1184 as enacted in 1885 was substantially a new section.

5. For decisions of the court and comments upon the provisions of this section, see chap. VIII, secs. 166-179 which treats of the contract

price and the manner, mode and medium of its payment; secs. 187-190 of premature payments; secs. 184-5 of the alteration of the contract and its effect upon the lien; and secs. 194-8 of void contracts and the rights of lien-claimants thereunder.

As to notice by claimant to owner of work done and materials furnished, its effect and the duty of the owner thereunder, see chap. XIII, sec. 333 *et seq.*, *infra*.

Section 1185 of the C. C. P.

Sec. 3. (§1185 C.C.P.) The land upon which any building, improvement, [99] well [99], or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, [73-4] to be determined by the court on rendering judgment [73-4], is also subject to the lien, if [a, 73-4] at the commencement of the work, or of the furnishing of the materials for the same [73-4], the land belonged to the person who caused said building, improvement, [99] well [99] or structure to be constructed, altered, or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien.

Land of contracting owner subject to lien. Extent of.

When and how determined.

What estate subject to lien.

NOTES TO SECTION 1185.

1. For explanation of brackets and figures, see note 1 to section 1183, *supra*.

The above section shows it as enacted upon the adoption of the C. C. P. in 1872 and as amended in 1873-4 (amds. 1873-4, 106), and in 1899 (stat. 1899, 24). The amendments of 1873-4 took effect May 29th, 1874, and those of 1899, April 24th, 1899.

2. The following matter was stricken out of section 1185 by the amendments of 1873-4, 107, (*supra*) at the place indicated by the letter "(a)": "At the time the work was commenced, or the materials for the same had commenced to be furnished", and the amendment of 1873-4 substituted therefor as above shown.

3. For former statutes, see sec. 6 of act of 1850, 211; sec. 5 of act of 1855, 156; sec. 4 of act of 1856, 203; sec. 4 of act of 1858, 225; secs. 4 and 17 of act of 1862, 384; and sec. 2 of act of 1868, 589.

4. For decisions of the court and comments upon this section, see chap. VI, sec. 92 *et seq.*, *infra*, which treats generally of the property subject to lien, and particularly sections 102-4 of that chapter which treat of the subject matter of this section.

Section 1186 of the C. C. P.

Priority of
Lien.
Time of
attaching.

Notice of
unrecorded
lien.
Effect of.

Sec. 4. (§1186 C.C.P.) The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance of which the lien-holder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished.

NOTES TO SECTION 1186.

1. This section was enacted in 1872 upon the adoption of the C. C. P.. took effect January 1, 1873, and has not since been amended.

2. For former statutes, see sec. 9 of the act of 1850, 211; sec. 5 of the act of 1855, 156; sec. 4 of the act of 1856, 203; sec. 1 of the supp. act of 1857, 58; sec. 4 of the act of 1858, 225; sec. 4 of the act of 1862, 384; and sec. 3 of the act of 1868, 589.

3. For decisions of the court and comments upon this section, see chap. XI, secs. 312-328 *infra*, which treats of priority of liens.

Section 1187 of the C. C. P.

Notice by
owner of
completion
of work.

Time of
filing same.

Where filed.

Contents
of notice.

Sec. 5. (§1187 C.C.P.) [97] The owner of any property on which labor has been performed, or for which materials have been furnished to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any work mentioned in section 1183 of this code, must, within ten days after the completion thereof, or within forty days after cessation from labor upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or the repair thereof, file for record in the office of the county recorder of the county, or city and county, in which such property or some part thereof is situated, a notice setting forth the date when such building, improvement, or structure, or the alteration, addi-

tion to, or repair thereof, was actually completed, or in case of cessation from labor for thirty days, the date on which such cessation actually occurred, and said notice shall also contain the name and the nature of the title of the person who caused the said building, improvement, or structure to be erected, or said alteration, addition to, or repair to be made, and also a description of the property sufficient for identification, and said notice must be verified by said owner or some other person in his behalf.

Notice
must be
verified.

In case any such owner neglect to file said notice as herein required, within the time herein required, then the said owner and all persons deraigning title from him, and all persons claiming an interest in said property, shall be estopped, in any proceedings brought to foreclose any mechanics' lien or liens provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter. Said notice, when so filed for record, must be recorded by the county recorder with whom the same is filed for record, and the fee for recording the same shall be the sum of one dollar. [97]

Penalty for
neglect to
file notice.

Notice must
be recorded.
Fee for.

Every original contractor [a, 97], at any time after the completion of his contract, and until the expiration of sixty days after the filing of said notice of completion or notice of cessation of labor by the owner, and every person, save the original contractor, claiming the benefit of this chapter, at any time after the completion of any building, improvement, or structure, or of the alteration, [87] *addition to* [87], or repair thereof, and until the expiration of thirty days after the filing of said notice of completion or cessation, by said owner, or within thirty days after the performance of any labor in any mining claim, must [97] file [73-4] for record [73-4] with the county recorder of the county, or city and

Claim of
lien.
Who must
file.
Time of
filing.

Mining
claims.
Time of
filing claim.
Claim must
be filed.
Place of
filing.

county, in which such property or some part thereof is situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person; [b, 97] provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, [87] *addition to* [87], or repair thereof [97].

Contents of claim. *[87] Any trivial imperfection in the said work, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and [c, 97] in all cases [97], the occupation or use of a building, improvement or structure, by the owner, or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure [d] and cessation from labor for thirty days upon any [e] contract, or upon any [f] building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter [87].*

Claim must be verified.

In all cases claim must be filed within ninety days.

Completion of contract, or work. What is trivial imperfection. use, occupation or acceptance.

Cessation from labor for thirty days.

NOTES TO SECTION 1187.

1. For explanation of brackets and figures see note 1 to section 1183, *supra*.

For convenience the amendments of 1887 are printed in italics.

2. The above section shows it as originally enacted upon the adoption of the C. C. P. and as amended in 1873-4, 1887 and 1897.

The original section took effect January 1, 1873; the amendments of 1873-4 (amds. 1873-4, 109), May 29, 1874; the amendments of 1887 (stat. 1887, 154), May 15th, 1887; and the amendments of 1897 (stat. 1897, 202), May 27, 1897.

3. The amendment of 1873-4 struck out of the original section at the place in the text indicated by the letter "[b]", the following clause: "If his contract or any part thereof is in writing, a copy of such writing must be filed with and made part of his claim."

4. By the amendment of 1897 the following matter was stricken out at the places indicated by the letters found in the text of the section:

[a] "within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter must within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration, addition to, or repair thereof, or the performance of any labor in a mining claim."

[c] "in case of contracts."

[d] "shall be deemed conclusive evidence of completion."

[e] "unfinished."

[f] "unfinished."

5. For former statutes with reference to the time of filing, contents, etc., of the claim of lien, see sec. 7, act of 1850, 211; secs. 3 and 6 of the act of 1855, 156; secs. 2 and 5 of the act of 1856, 203; sec. 2 of the act of 1858, 225; sec. 25 of the act of 1862, 384; sec. 25 of the supp. act of 1863-4, 269; secs. 5 and 6 of the act of 1868, 589.

6. The various provisions of section 1187 are presented in chap. IX, secs. 211-295. For notice of completion of work by owner, contents, and time and place of filing, see sec. 273 *et seq.*, of that chapter. For claim of lien, necessity for filing, contents of, and time and place of filing, see sec. 211 *et seq.* For time of filing claim against mining claim, see sec. 266. For the provisions requiring all claims to be filed within ninety days, see sec. 282. For completion of contract, trivial imperfection, use, occupation or acceptance, and cessation from labor for thirty days, see sec. 283 *et seq. infra*.

Section 1188 of the C. C. P.

Sec. 6. (§1188 C.C.P.) In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise, the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

Claim against two buildings, etc.
Amount against each must be designated.

Penalty for failure to designate.

Extent and priority of such lien.

NOTES TO SECTION 1188.

1. The above section shows it as enacted upon the adoption of the O. C. P. in 1872. It took effect January 1, 1873, and has not since been amended.

2. This section is substantially the same as section 7 of the act of 1868, 591, omitting "joint" between "such" and "claim" in the text of the section, and also omitting the final clause: "Provided that no joint claim shall be filed upon two or more buildings unless they are contiguous to or adjoining each other."

3. For decisions and comments upon this section, see chap. IX, sec. 243 *et seq.*, *infra*.

Section 1189 of the C. C. P.

Claim must
be recorded
and
indexed.

Sec. 7. (§1189 C.C.P.) The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

Fees for.

NOTES TO SECTION 1189.

1. This section shows it as enacted upon the adoption of the O. C. P. in 1872. It took effect January 1, 1873, and has not since been amended.

2. For fees of recorders, see fee bill of 1895 (stat. 1895, 267). As to manner and book of recording claim, see subdivision 6, section 120, county government act of 1897, (stat. 1897, 484), and subdivision 16 of section 4236 of the Political Code.

Section 1190 of the C. C. P.

Lien
continues
for ninety
days.
Suit must
be brought
within
that time.

Sec. 8. (§1190 C.C.P.) No lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit.

Rule where
credit is
given.

No lien
continues
longer than
two years.

NOTES TO SECTION 1190.

1. This section shows it as enacted upon the adoption of the C. C. P. in 1872. It took effect January 1, 1873, and has not since been amended.
2. For former statutes with reference to the time within which suit was required to be commenced, see secs. 4 and 8 of the act of 1850, 211; sec. 7 of the act of 1855, 156; sec. 6 of the act of 1856, 203; sec. 19 of the act of 1862, 384; and sec. 8 of the act of 1868, 589.
3. For decisions and comments upon this section, see chap. XV, secs. 368-370, *infra*.

Section 1191 of the C. C. P.

Sec. 9. (§1191 C.C.P.) Any person who, at the request of the [87] reputed [87] owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street [85] or sidewalk [85] in front of or adjoining the same, [87] or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith [87], has a lien upon said lot for his work done and materials furnished.

Improvement of lot, street, etc.
Lien for work and material.

NOTES TO SECTION 1191.

1. For explanation of figures and brackets in the text of the section, see note 1 to section 1 of this chapter.
2. This was section 1184 of the code as originally adopted. The amendments of 1885 and 1887 have since been added. The original section took effect January 1, 1873; the amendment of 1885 (stat. 1885, 145) May 17, 1885; and the amendments of 1887 (stat. 1887, 155), March 15, 1887.
3. Section 1191, as originally enacted upon the adoption of the code in 1872, provided for the service of summons by publication.
4. For former statutes with reference to grading, etc., city lot, see sec. 2 of act of 1855, 156; secs. 12 and 13 of the act of 1856, 203; secs. 21 and 22 of the act of 1862, 384; sec. 9 of the act of 1868, 589; and sec. 1184 of the code as originally adopted.
5. For decisions and comments upon this section, see sections 109, 110, 150, *infra*.

Section 1192 of the C. C. P.

Sec. 10. (§1192 C.C.P.) Every building or other improvement mentioned in section 1183 of this code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have

Estates in land of non-contracting owner subject to lien, when Estoppel.

been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming any interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

Notice by
owner
disclaiming
responsibility.
Time of
giving.

Contents of.
How given.

NOTES TO SECTION 1192.

1. This section was enacted in 1874 (amds. 1873-4, 109), took effect May 29, 1874, and has not since been amended. It was substituted for the original section of the same number which defined 'subcontractors' and gave them a prior right of payment out of the proceeds of the sale of the property.

2. For former statute, see section 4 of the act of 1868, 590.

3. For decisions and comments upon this section, see chap. VI, section 105 *et seq. infra*.

Section 1193 of the C. C. P.

Lien of contractor.
Amount which he may recover on.
Offsets against.

Contractor must defend actions.

Contract price.
When owner may withhold.

Offsets of owner against contractor.

Sec. 11. (§1193 C.C.P.) The contractor shall be entitled to recover upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where a lien shall be filed, under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled

to deduct from any amount due or to become due by him to the contractor the amount of such judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable.

Personal
action by
owner
against
contractor,
when.

NOTES TO SECTION 1193.

1. This section was enacted in 1873 (amds. 1873-4, 109), took effect May 29, 1874, and has not since been amended. It was substituted for the original section of the same number which provided for costs, etc., and which is now part of section 1195.

2. For former statute, see section 11 of the act of 1868, 589.

3. For decisions and comments on this section, see chap. X, sec. 303, and chap. XV, sec. 410 *et seq. infra*.

Section 1194 of the C. C. P.

Sec. 12. (§1194 C.C.P.) In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens [73-4, 85] which shall be in the following order, viz:

Rank of
Mechanics'
liens.
Judgment
must
determine.

1. All persons performing manual labor in, on or about the same;

Order of
preference.

2. Persons furnishing materials;

3. Subcontractors;

4. Original contractors. [73-4, 85.]

And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; [73-4] and whenever, in the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages [73-4].

Proceeds of
sale of
property.
How
applied.

Deficiency
judgment.
When may
be docketed
Practice on.

NOTES TO SECTION 1194.

1. For explanation of figures and brackets, see note 1 to section 1 of this chapter.

2. The above section shows it as enacted upon adoption of the C. C. P. in 1872, and as amended in 1874 and in 1885. The original section took effect January 1, 1873; the amendments of 1873-4, May 29, 1874; and the amendments of 1885, 145, May 17, 1885. The amendments of 1873-4 consolidated original sections 1194 and 1195.

3. The amendment as to the rank of the liens in 1873-4 for which the amendment of 1885 was substituted, was as follows:

"1. All persons other than the original contractors and subcontractors;

"2. The subcontractors;

"3. The original contractors."

4. For former statute, see sub. 2 of section 10 of the act of 1868, 589.

5. For decisions and comments on this section, see chap. XV, secs. 450-451 *infra*.

Section 1195 of the C. C. P.

Suit to
foreclose
lien.
Joinder of
lien-
claimants.
Consolida-
tion of suits.

Costs and
attorney's
fees.

To whom
and when
allowed.

Sec. 13. (§1195 C.C.P.) Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them. *The court [85] must [85] also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the [85] Superior [85] and Supreme Courts, [85] such costs and attorneys' fees to be allowed to each lien-claimant whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action or separate actions are consolidated [85].*

NOTES TO SECTION 1195.

For explanation of figures and brackets, see note 1 to section 1 of this chapter.

1. The amendments of 1873-4, 110, are printed in italics. By the amendments of 1885, 146, the words "must" and "superior" were substituted for "may" and "district", respectively.

The original section took effect January 1, 1873; the amendments of 1873-4: May 29, 1874; and the amendments of 1885, May 17, 1885.

The amendment of 1873-4 consolidated original sections 1196 and 1193.

2. For former statutes, see secs. 6 and 7 of the act of 1862, 384; sec. 7 of the act of 1863-4, 269; and sub. 3 of sec. 10 of the act of 1868, 589.

3. For decisions and comments upon this section, see chap. XV, secs. 372, 379, 380, 452-456, 457, *infra*.

Section 1196 of the C. C. P.

Sec. 14. (§1196 C.C.P.) Whenever materials shall have been furnished for use in the construction, alteration, or repair of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining-claim or other improvement.

Materials not subject to attachment, execution, etc.,

except for purchase price thereof.

NOTES TO SECTION 1196.

1. This section was enacted in 1873-4, 110, took effect May 29, 1874, and has not since been amended.
2. Subdivision 16 of section 690 of the C. C. P. contains a similar provision with reference to exemption of materials from execution.
3. For former statutes, see sec. 7 of the act of 1861, 495; sec. 16 of the act of 1862, 384; and sec. 12 of the act of 1868, 589.
4. For decisions and comments on this section, see chap. XI, sec. 323 *et seq.*, *infra*.

Section 1197 of the C. C. P.

Sec. 15. (§1197 C.C.P.) Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done, or materials furnished, to maintain a personal action to recover such debt against the person liable therefor.

Personal action on debt not impaired or affected.

NOTES TO SECTION 1197.

1. This section stands upon the amendment of 1873-4, 110, which took effect July 1, 1874.
2. By this amendment the word "shall" was substituted for "can" of the original section, and the following clause stricken out:
 "and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and, in his affidavit to procure an attachment, need not state that his demand is not secured by a lien; but the judgment, if any, obtained by the plaintiff in such personal action, cannot be construed to impair or merge any lien held by plaintiff under this chapter."

3. For former statutes, see sec. 12 of the act of 1850, 211; sec. 9 of the act of 1855, 156; sec. 8 of the act of 1858, 203; sec. 7 of the act of 1861, 495; sec. 14 of the act of 1862, 384; sec. 7 of the act of 1863-4, 269; and sec. 13 of the act of 1868, 589.

4. For decisions and comments on this section see chap. XIV, secs. 357-364 *infra*.

Section 1198 of the C. C. P.

Rules of
practice
and
pleading.

Sec. 16. (§1198 C.C.P.) Except as otherwise provided in this chapter, the provisions of part II of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

NOTES TO SECTION 1198.

1. This section shows it as enacted upon the adoption of the C. C. P. in 1872. It took effect January 1, 1873 and has not since been amended.

2. For former statutes see sec. 8 of the act of 1855, 156; sec. 7 of the act of 1858, 203; sec. 7 of the act of 1858, 225; secs. 6 and 7 of the act of 1862, 384; and sec. 10 of the act of 1868, 589.

3. For comments on this section and rules of practice, see chap. XV, sec. 371, *infra*.

Section 1199 of the C. C. P.

New trial
and appeals.
Rules
applicable
to.

Sec. 17. (§1199 C.C.P.) The provisions of part II of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

NOTES TO SECTION 1199.

1. This section shows it as originally enacted upon the adoption of the C. C. P. in 1872. It took effect January 1, 1873 and has not since been amended.

2. For the subject of new trials and appeals, see chap. XV, sec. 430 *infra*.

Section 1200 of the C. C. P.

Failure to
perform
and
abandon-
ment of
contract by
contractor.

Sec. 18. (§1200 C.C.P.) In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows:

From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens.

Amount of price applicable to liens.

Rule for determination and apportioning same.

NOTES TO SECTION 1200.

1. This was enacted as new section in 1885, 146, and has not since been amended. It was approved March 18, 1885.

2. For the subject of performance of contract, see chap. VIII, sec. 199, *et seq.*; for the particular subject matter of this section, see chap. X, secs. 307, 311 *infra*.

Section 1201 of the C. C. P.

Sec. 19. (§ 1201 C.C.P.) It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void.

Waiver or impairment of lien.

When terms of contract waiving, etc.

Null and void.

NOTES TO SECTION 1201.

1. This was enacted as a new section in 1885, 146, and has not since been amended. It was approved March 18, 1885.

2. For the subject of waiver of liens and decisions and comments upon this section, see chap. VIII, secs. 180-183 *infra*.

Section 1202 of the C. C. P.

Sec. 20. (§ 1202 C.C.P.) Any person who shall willfully give a false notice of his claim to the owner, under the provisions of section 1184, shall forfeit his lien. Any person who shall willfully

Willfully false notice under sec. 1184 forfeits lien.

Willfully
false claim
under sec.
1187 forfeits
lien.

Conspiracy
or
agreement
by which
contract
price is
shown less
than it
really is,
renders
contract
"wholly
void."

Effect of,
on lien.

include in his claim, filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien. If the owner and his contractor shall directly or indirectly conspire to or agree that the written contract filed shall appear to show the contract price to be less than it really is, and it shall accordingly so show, then such contract shall be wholly void, and no recovery shall be had thereon by either party thereto, and in such case the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof.

NOTES TO SECTION 1202.

1. This section was enacted in 1885, 146, approved March 18, 1855, and has not since been amended.
2. For former statute as to false claim of lien, see section 11 of the act of 1862, 384.
3. For decisions and comments upon statute as to false notice under section 1184, see chap. XIII, sec. 356; for the same upon false claim of lien, see chap. IX, secs. 294-5; for the same upon false statement of contract price, see chap. VIII, sec. 179 *infra*.

Section 1203 of the C. C. P.

Bond with
sureties
must
be filed with
contract.
Amount of.

For whose
benefit bond
must be
made to
inure.

Action on.
By whom
and for
what.

Sec. 21. (§1203 C.C.P.) Every contract required to be filed under the provisions of this chapter shall be accompanied by a good and sufficient bond in an amount equal to at least twenty-five per cent. of the contract price, which said bond shall be filed at the same time and in the same manner as herein provided for the filing of such contract, or memorandum thereof. Said bond shall, by its terms, be made to inure to the benefit of any and all persons who perform labor for, or furnish materials to the contractor, or any person acting for him, or by his authority; and any such person shall have an action to recover upon said bond, against the prin-

principal and sureties, or either of them, for the value of such labor or materials, or both, not exceeding the amount of the bond; but such action shall not affect his lien, nor any action to foreclose the same, except that there shall be but one satisfaction of his lien, with costs and counsel fees. Any failure to comply with the provision of this section shall render the owner and contractor jointly and severally liable in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by said contract.

Action on does not affect lien.

Failure to give bond renders owner and contractor liable in damages.

NOTES TO SECTION 1203.

1. In 1885 (stat. 1885, 147) a new section was added to the C. C. P. in the following words:

"Any bond which may be given by the contractor to the owner, for the faithful performance of his contract, shall be filed, with the contract, in the recorder's office, or be void; and whatever may be its terms, shall inure to any person who performs labor for or furnishes materials to the contract; and any such person shall have an action to recover upon said bond against the principal and sureties, or any or either of them, for the value of such labor and materials, not to exceed the amount of the bond; but such action shall not affect his liens, nor any action to foreclose it, except that there shall be but one satisfaction of his claim, with costs and counsel fees. Nothing in this section contained shall affect or impair the rights of the owner under the bond. Nor shall any alteration in the contract, or deviation in the work or in the payments, release the sureties on said bond from their liability, except to the owner."

In 1887 (stat. 1887, 155) the above section was repealed, the repealing act taking effect March 15, 1887.

Section 1203 as it now stands was enacted in 1893 (stat. 1893, 203), was approved March 23, 1893, and has not since been amended.

2. For decisions and comments upon bond required by the statute, see chap. VIII, secs. 204-209 *infra*.

Sec. 22. AN ACT TO SECURE THE PAYMENT OF THE CLAIMS OF MATERIALMEN, MECHANICS, OR LABORERS, EMPLOYED BY CONTRACTORS UPON STATE, MUNICIPAL, OR OTHER PUBLIC WORK. *Approved March 27, 1897.*

"Section 1. Every contractor, person, company or corporation, to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work, for this state, or

Contractor must file bond.

Time of filing.	by any county, city and county, city, town, or district therein, shall, before entering upon the performance of such work, file with the commissioners,
With whom filed.	managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a good and sufficient bond, to be approved by such contracting body, officers, or board, in a sum not less than one-half of the total amount payable by the terms of the contract; such bond shall be executed by the contractor, and at least two sureties, in an amount not less than the sum specified in the bond, and must provide that if the contractor, person, company, or corporation, fails to pay for any materials or supplies furnished for the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the sureties will pay the same, in an amount not exceeding the sum specified in the bond; provided, that such claims shall be filed as hereafter required.
Bond to be approved by contracting body.	
Amount of bond.	
Must have at least two sureties.	
Provisions which bond must contain.	
Claim for work or materials may be filed.	“Sec. 2. Any materialman, person, company, or corporation, furnishing materials or supplies used in the performance of the work contracted to be executed or performed, or any person who performed work or labor upon the same, or any person who supplies both work and materials, and whose claim has not been paid by the contractor, company, or corporation, to whom the contract has been awarded, shall, within thirty days from the time such work is completed, file with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom such contract was awarded, a verified statement of such claims, together with a statement that the same has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation filing the same may commence an
Who may file.	
Time of filing.	
With whom filed.	
Claim must be verified.	
Contents of.	
Action on bond.	
Who may bring.	
When may be brought.	

action against the sureties on the bond, specified and required by section one hereof.

"Sec. 3. This act shall take effect immediately" (stat. 1897, 201).

Sec. 22a. AN ACT TO AMEND AN ACT ENTITLED 'AN ACT TO PROVIDE FOR WORK UPON STREETS, LANES, ALLEYS, COURTS, PLACES, AND SIDEWALKS, AND FOR THE CONSTRUCTION OF SEWERS, WITHIN MUNICIPALITIES,' APPROVED MARCH 18, 1885, BY ADDING THERETO A NEW SECTION TO BE KNOWN AS SECTION SIX AND ONE-HALF, RELATING TO SECURING CLAIMS FOR LABOR DONE AND MATERIAL FURNISHED FOR IMPROVEMENTS UNDER SAID ACT. *Approved February 21, 1899.*

"Sec. 6½. Every contractor, person, company, or corporation, including contracting owners, to whom is awarded any contract for street work under this act, shall, before executing the said contract file with the superintendent of streets a good and sufficient bond, approved by the mayor, in a sum not less than one-half of the total amount payable by the terms of said contract; such bond shall be executed by the principal and at least two sureties, who shall qualify for double the sum specified in said bond, and shall be made to inure to the benefit of any and all persons, companies, or corporations who perform labor on, or furnish materials to be used in the said work of improvement, and shall provide that if the contractor, person, company, or corporation to whom said contract was awarded fails to pay for any materials so furnished for the said work of improvement, or for any work or labor done thereon of any kind, that the sureties will pay the same, to an amount not exceeding the sum specified in said bond. Any materialman, person, company, or corporation, fur-

Contractor must file bond.

Time of filing.
With whom filed.
Amount of.

Sureties.

To whom made to inure.

Contents of.

Claim for work, etc., may be filed.
Who may file.

Time of filing. With whom filed. Contents of. Action on bond. Who may bring. Time of commenc- ing. Amount recoverable	<p>nishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim, the person, company, or corporation, filing the same, or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action, and a reasonable attorney fee, to be fixed by the court for the prosecution thereof.</p>
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"This act shall take effect and be in force from and after its passage." (Stat. 1899, 23.)

Note—For act securing the wages of persons employed as laborers on threshing machines, see statutes 1885, 109. For lien upon personal property, see sec. 3051 *et seq.* of the Civil Code. For act giving lien to loggers, see act of 1878 (stat. 1878, 747), and the amendment thereof in 1880 (stat. 1880, 38, 39).

The act of 1891 (stat. 1891, 195), providing for the payment of the wages of mechanics and laborers employed by corporations was declared unconstitutional in *Slocum v. Bear Valley, etc., Co.*, 122 Cal. 555, 55 P. 403.

CHAPTER II.

DEFINITION AND NATURE OF LIEN. CONSTRUCTION AND CONSTITUTIONALITY OF LIEN LAW.

Section.		Section.	
23	DEFINITION OF LIEN.	29	Rule of liberal construction in favor of the owner.
24	NATURE OF LIEN.	30	Rule of liberal construction in favor of lien-claimant.
25	CONSTRUCTION. Generally.	31	The same.
26	Rules of liberal and strict construction.	32	CONSTITUTIONALITY OF LIEN LAW.
27	Rule of strict construction. The lien-claimant.	33	The same. Generally.
28	Rule of strict construction. The owner.	34	The same. Act of 1868.

Definition of lien.

Sec. 23. Section 1180 of the C. C. P. which is included in the chapter of that code upon mechanics' liens, defines a lien to be a charge imposed upon specific property by which it is made security for the performance of an act.

Section 3059 of the Civil Code provides that liens of mechanics for materials and services upon real property are regulated by the Code of Civil Procedure. (Secs. 1183-1203.)

In the American and English Encyclopædia of Law (vol. 15, p. 5) the lien of a mechanic is defined to be:

"A claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting a building, and as such it attaches to the land as well as the building erected thereon. Of itself, it is a peculiar, particular and special remedy given by the statute, founded and circumscribed by the terms of its own creation."

This definition confounds the right to a lien with the lien itself. A laborer or a materialman may have a right to a lien, and yet not have a lien upon anything. The California statute gives the right to the persons named in it who perform the labor or furnish the materials therein specified, to claim a lien for their labor or their materials. It gives nothing more. The lien does not result by the mere performance of labor or the mere furnishing of materials. It is incumbent upon the person who, under the statute, has a right to a lien, to perfect such right in the manner therein pointed out, and when so perfected it then becomes a lien and attaches to the property.

It is such lien which is a charge upon specific property, and which is security for the payment of the debt due a lien-claimant either for the price, or for the value of his work or materials, or both.

Nature of lien.

Sec. 24. The lien of the mechanic is a statutory creation. It derives its existence only from positive enactment. (*Spinney v. Griffith*, 98 Cal. 153, 32 P. 974; *Davis v. MacDonough*, 109 Cal. 547, 550, 42 P. 450; *Whitney v. Higgins* 10 Cal. 547, 551; *McCrea v. Craig*, 23 Cal. 522, 525; *McLaughlin v. Perkins* 102 Cal. 502, 36 P. 839.) The lien as such was unknown both at common law and to equity jurisprudence. (*Spinney v. Griffith*, *supra*; *Ellison v. Jackson W. Co.* 12 Cal. 542.)

It was likewise unknown to the Mexican law. (*Macondray v. Simmons*, 1 Cal. 393; *Stowell v. Simmons*, 1 Cal. 452.)

Yet it is favored in law. (*Tuttle v. Montford*, 7 Cal. 358; *McCrea v. Craig*, *supra*.)

In *Ritter v. Stevenson*, 7 Cal. 388, the court had under consideration the assignment of the lien, and it was said that the lien was in the nature of a mortgage and a charge on the land. (*Curnow v. Blue Gravel, etc. Co.*, 68 Cal. 264, 9 P. 149.)

In *Germania etc. Co. v. Wagner*, 61 Cal. 349, 355, where the court had under consideration the merger of the lien of the mechanic by entry of judgment against the party personally liable, it was said that the lien was but a collateral security for the debt.

In *Booth v. Pendola*, 88 Cal. 36, 25 P. 1101, the rule was laid down that an action to foreclose a lien was in the nature of a proceeding *in rem* in which no personal judgment could be recovered against the estate of the deceased owner payable in the due course of administration.

Of the notice which may be served upon the owner and the contract price thereby intercepted in his hands under the provisions of section 1184 of the C. C. P., it has been said that it operated as an attachment without the expense of suit. (*Cahoon v. Levy*, 6 Cal. 295; *Davis v. Livingston*, 29 Cal. 283. See sec. 337 *infra*.)

Construction of lien law generally.

Sec. 25. The constitution of 1879 did not repeal or abrogate the then existing law giving liens to mechanics and others upon real property found in sections 1183 to 1199 of the C. C. P., and such law was preserved in full force and effect by section 1, article XXII of that constitution. (*Germania, etc. Ass'n v. Wagner*, 61 Cal. 349.)

Where the contract was made and the materials were furnished while the lien law of 1858 was in force, but the notice of lien was not filed until after the lien law of 1862 went into effect, the lien was not lost, but was enforceable in accordance with the provisions of the lien law of 1862. (*McCrea v. Craig*, 23 Cal. 522.)

A statute which shortens the time within which to file a mechanic's lien applies to pending cases of uncompleted buildings, and is not retroactive when so applied. (*Lumber Co. v. Olmstead*, 85 Cal. 80, 24 P. 648.)

Rules of liberal and of strict construction.

Sec. 26. The general rules of statutory construction will be found in sections 4, 1858 and 1859 of the Code of Civil Procedure.

Prior to the code (sec. 4, C. C. P.) the rule was that the statute being in derogation of the common law, must be strictly construed (*Bottomly v. Grace Church*, 2 Cal. 90; *McAlpin v. Duncan*, 16 Cal. 127.)

In giving construction to the lien law, it must be borne in mind that this law is designed for the protection of the persons to whom it gives the right to liens, by securing to them, when they have perfected such right, priority of payment of their claims for their labor and materials, but that in giving this security and protection, it trespasses upon the rights of the property owner.

Considering the law, therefore, from the standpoint of the laborer and the materialman, it should be liberally construed with a view of giving effect to the intention of the law-making power as above stated.

Considering the law, however, from the standpoint of the property owner, it should receive a strict construction because of the extraordinary rights given by it to mechanics and others (*Davis v. Livingston*, 29 Cal. 283), and because many of its provisions which subject the property of the owner to liens, are penal in their nature.

The rule of construction to be applied in any given case depends, therefore, upon the facts of such case, and the particular provisions of the lien law governing the same.

In the following sections of this chapter the decisions illustrating the two rules of strict and of liberal construction are noticed, and so far as possible, the rules for their application laid down.

Rule of strict construction. The lien-claimant.

Sec. 27. The lien law is a statutory creation. It expressly names the persons to whom it gives the right to claim liens, and prescribes the conditions which must be fulfilled to entitle them to liens. A lien-claimant, in order to secure the benefit of the statute, must bring himself clearly within one of the classes of persons named, and show a compliance with every one of the essential requirements of the statute. The rule of strict construction obtains. The court will not enlarge upon the classes of lien-claimants enumerated in the statute, nor dispense with compliance on the part of lien-claimants with any one of the essential requirements of the statute.

(See *McCormick v. Los Angeles W. Co.*, 40 Cal. 185; *Mills v. La Verne L. Co.*, 97 Cal. 254, 32 P. 169; *Walker v. Hauss-Hijo*, 1 Cal. 183; *Wagner v. Hansen*, 103 Cal. 104, 37 P. 195; as to essential requirements see *Hooper v. Flood*, 54 Cal. 221; *Morris v. Wilson*, 97 Cal. 644, 32 P. 801; *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; *Davis v. Livingston*, 29 Cal. 183; chap. IX, secs. 220-241, *infra*.)

The adoption by the court of any other rule in these respects would have the effect of legislating—of making law—instead of giving construction to the present statute. (*Mills v. La Verne L. Co.*, *supra*; secs. 1858, 1859, C. C. P.)

Where the statute imposes a penalty upon the lien-claimant, it is then strictly construed in his favor.

Section 1202 of the C. C. P., which provides that any person who shall willfully give a false notice of his claim of lien to the owner under the provisions of section 1184 of the same code, or who shall willfully include in his claim of lien filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien, is penal in its character, and not only must be strictly construed, but the evidence under which it is invoked should be clear and convincing that the violation was willful and intentional. (*Lumber Co. v. Neal*, 91 Cal. 362, 27 P. 743.)

Rule of strict construction. The owner.

Sec. 28. The rule of strict construction obtains in favor of the owner of the property. The lien law imposes severe penalties upon the owner, for his violation of its provisions, and the court will not, by construction, enlarge upon the rights of lien-claimants at the expense of the property owner.

The lien law will not, therefore, be construed to give liens to subcontractors and laborers, upon the property of the owner for the entire amount of the last, or subcontract, without any regard to the original contract, for this would permit the contractor to encumber, at his discretion, the whole property of the owner, and subject it to liens beyond the limits of the original contract. (*McAlpin v. Duncan*, 16 Cal. 127; *Dore v. Sellers*, 27 Cal. 588; see secs. 303-305, *infra*.)

Subcontractors, materialmen, or laborers who furnish materials or labor in the construction of a building, and rely upon their right of lien under the statute as security for their pay, must be held to know the terms to which that right is subordinate and upon which such lien can be secured, and to a strict compliance with those terms. (*Henley v. Wadsworth*, 38 Cal. 356, 362.)

In *West Coast L. Co. v. Knapp*, 122 Cal. 79, 54 P. 533, the court having under consideration section 1184 of the C. C. P., say:

"So far as the statute has the effect of compelling the owner to pay more than he has agreed to pay, or to pay twice, it is highly penal, and should be strictly construed in his favor. Those who seek to inflict upon him a penalty for his failure to comply with the terms of the law, must show clearly that the dereliction has occurred. The law must be construed against the exaction of the penalty, if in reason it can be."

Rule of liberal construction in favor of owner.

Sec. 29. Closely connected with that laid down in the last section is the rule of liberal construction in favor of the owner of the property. The lien law requires the owner, in certain cases, to make written contracts for the construction of his improvements, which, as the statute (sec. 1184, C. C. P., sec. 2, *supra*) provides shall contain certain stipulations as to the time of payment of the price, be filed for record, etc. Other sections of the same law make it the duty of the owner to do certain acts, and for a violation of these statutory provisions, his property is made subject to liens for the value of all work done and materials furnished. These provisions of the lien law are penal in their nature and the rule is, therefore, that there must be a clear violation of the law before the court will enforce the penalty. The rule does not go to the extent of excusing non-compliance with the statute, but, by liberal construction, it substitutes a substantial for a strict fulfillment of the requirements of the statute. (See *Reed v. Norton*, 90 Cal. 590, 27 P. 426; *Dunlop v. Kennedy*, 34 P. 92, overruled in *S. C.* 102 Cal. 443, 36 P. 765, but not on this point.)

Under this rule, a contract which provides that the balance of twenty-five per cent. of the contract price shall be paid thirty-five days after the completion of the building, but may be paid at any time between the date of completion and the thirty-five days, in case the contractors show receipts and give special bonds that all bills will be paid and that no liens or other claims exist against the premises, such payment to be optional with the owner, is in substantial compliance with the statute. (*Yancy v. Norton*, 94 Cal. 558, 29 P. 1111; thirty instead of thirty-five days, *San Diego L. Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431; thirty-six days, *West Coast L. Co. v. Knapp*, 122 Cal. 79, 54 P. 533; twenty-five per cent of price, *Stimson M. Co. v. Riley* 42 P. 1072; see secs. 173-176, *infra*.)

The statute in imposing a penalty upon the owner beyond the price he contracted to pay in favor of a sub-

contractor, is penal as well as remedial and while it must be reasonably construed to effectuate its remedial purposes, it must be strictly construed as respects its penal character, and no merely technical construction can be indulged in favor of visiting a penalty upon the owner where there has not been a substantial failure to comply with the law, such as if continued would defeat its remedial purposes; and if there be a reasonable doubt as to the construction of the statute, or as to whether the owner has complied with it, he should have the benefit of the doubt. (*Joost v. Sullivan*, 111 Cal. 286, 43 P. 896.)

Rule of liberal construction in favor of lien-claimant.

Sec. 30. Notwithstanding the lien law was unknown at common law (*Spinney v. Griffith*, 98 Cal. 151, 32 P. 974) and that equity raises no lien in favor of laborers and materialmen (*Ellison v. Jackson W. Co.*, 12 Cal. 555,) yet it is favored in law. (*Tuttle v. Montford*, 7 Cal. 358; *McCrea v. Craig* 23 Cal. 525.)

The Supreme Court has uniformly carried out the intention of the people as expressed in the constitution of 1879 (sec. 15, art. XX) and of the legislature as found in the lien law, by giving to them such construction that the rights of the persons named in them have been fully guarded and yet the property of owners has not been permitted to be burdened beyond the plain limitations of the law.

It has already been pointed out (sec. 27, *supra*) that the total omission to comply with any essential requirement of the lien law is fatal to the lien. A distinction, however, should be made between a total omission to comply with the requirements of the law, and a substantial compliance with them. In the former case, there is no room for construction but in the latter, the rule of liberal construction obtains in favor of the lien-claimant (where a penalty would not thereby be imposed upon the owner) which rule

requires only the substantial observance of the provisions of the law. (*Tredinnick v. Mining Co.*, 72 Cal. 78, 80, 13 P. 152; *Hagman v. Williams* 88 Cal. 146, 25 P. 1111; *Corbett v. Chambers*, 109 Cal. 178, 41 P. 873.)

Rule of liberal construction in favor of lien claimant, continued.

Sec. 31. The persons for whose benefit the statute was enacted are not presumed to be versed in the niceties of pleadings, and the notices, which under its provisions, they are authorized to give, have regard to substance rather than to form. (See as to name of owner, *Corbett v. Chambers* 109 Cal. 178, 41 P. 873; *Phelps v. Mining Co.*, 49 Cal. 337; *Russ L. Co. v. Garretson*, 87 Cal. 589, 25 P. 747; as to name of employer, *Jewell v. McKay* 82 Cal. 144, 23 P. 139; *Malone v. Mining Co.*, 76 Cal. 578, 18 P. 772; *Ascha v. Fitch*, 46 P. 298; sec. 225 *et seq.*, *infra*; as to terms, etc., of contract, *Wagner v. Hansen* 103 Cal. 104, 37 P. 195; *McGinty v. Morgan*, 122 Cal. 103, 54 P. 392; *Ascha v. Fitch*, *supra*; sec. 231, *infra*; generally, *Hagman v. Williams*, 88 Cal. 146, 25 P. 1111; *Rauer v. Fay* 110 Cal. 361, 42 P. 902; chap. IX, *infra*.)

Under the above rule a mere mistake will not invalidate the claim of lien. (*McDonald v. Backus*, 45 Cal. 262; *Harmon v. Ashmead*, 68 Cal. 321, 9 P. 183; *Slight v. Patton*, 96 Cal. 384, 31 P. 248; *Preston v. Sonora Lodge*, 39 Cal. 116; *Ascha v. Fitch*, *supra*; *Snell v. Payne*, 115 Cal. 218, 46 P. 1096; *Jewell v. McKay*, *supra*.)

The rule of construction laid down does not apply where the claim omits one of the essential statements required by the statute. (*Wood v. Wrede*, 45 Cal. 637; *Hooper v. Flood*, 54 Cal. 218; *Santa Monica L. Co. v. Hege*, 119 Cal. 376, 51 P. 555; *Fernandez v. Burleson*, 110 Cal. 164, 42 P. 566; *Phelps v. Mining Co.*, *supra*; *Penrose v. Calkins*, 77 Cal. 396, 19 P. 641.)

(For construction of statute with reference to work and materials lienable, see chap. V.; persons entitled to liens, chap. IV; notice by claimant to owner, chap. XIII, *infra*.)

Constitutionality of lien law.

Sec. 32. Section 15 of article XX of the state constitution of California (1879) provides:

“Mechanics, materialmen, artisans and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the legislature shall provide by law for the speedy and efficient enforcement of such liens.”

This declaration of a right, like many others in the constitution is inoperative except as supplemented by legislative action. So far as substantial benefits are concerned, the naked right without the interposition of the legislature is like the earth before creation “without form and void,” or to put it in the usual form, the constitution in this respect is not self-executing. (*Spinney v. Griffith*, 98 Cal. 152, 32 P. 974.)

The provisions of the constitution above quoted were intended to continue and make permanent the statute theretofore existing (act of 1868, 589) with the construction it had received; they were not intended to enlarge but to fix.

Under the lien act of 1868 as construed in *Renton v. Conley*, 49 Cal. 185, materialmen and laborers could not charge buildings with liens exceeding the balance of the contract price unpaid when notice of the lien was given.

The last clause of section 1183 of the C. C. P. (under the amendment thereto made in 1880, see sec. 1, *supra*), provided that “This lien shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party.” It was held in *Latson v. Nelson*, 11 Pac. C. L. J. 589, that the legislature had not the power to enlarge or extend the provisions of the constitution, and that therefore, laborers and materialmen could not charge the building of the owner in excess of the balance of the contract price as above stated.

The same. Generally.

Sec. 33. It was not the intention of the new constitution (1879) to repeal or abrogate the then existing law giving liens to mechanics and others upon real property found in sections 1183 to 1199 of the Code of Civil Procedure, and such law was preserved in full force and effect by section 1, article XXII of the constitution. (*Germania etc. Ass'n v. Wagner*, 61 Cal. 349.)

Section 1191 of the C. C. P., so far as it purports to authorize the creation of a lien upon land by virtue of a contract for the improvement of the street adjacent thereto, entered into with one who is only the reputed owner of the land, or to affect the interest of the real owner therein, is unconstitutional. (*Santa Cruz R. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097.)

If the owner of land, or any one claiming an interest therein, knowingly permits buildings and improvements to be erected on it without giving notice that it is done without his consent it is just that he should be held to have acquiesced therein as provided in section 4 of the lien act of 1868 (stat. 1868, 589, sec. 1192 C. C. P.); and the power of the legislature to enact that provision is clear. (*Fuquay v. Stickney*, 41 Cal. 583.)

The legislature, though it cannot compel the owner to pay more than he has contracted to pay where the contract is valid, unless notified of the claims of subcontractors before payment to the contractor, yet has the power to require a record of the contract as a condition of its validity, and to forbid any payments to the contractor as against materialmen and laborers unless the contract is recorded. (*Kellogg v. Howes*, 81 Cal. 170, 22 P. 509.)

The amendment of 1887 to section 1241 of the Civil Code (stat. 1887, 81) making a homestead subject to a lien for materials furnished for repairs or improvements thereon, applies to a lien filed after its passage, though the materials

for which the lien is claimed were furnished before the passage of the amendment. (*Lumber Co. v. Gottschalk* 81 Cal. 641, 22 P. 860.)

A statute which shortens the time within which to file claims of lien applies to pending cases of uncompleted buildings, and is not retroactive when so applied, nor does it impair any vested right, provided an adequate and available remedy be left to enforce the lien within a reasonably sufficient time. (*Mill and Lumber Co. v. Olmstead*, 85 Cal. 80, 24 P. 648.)

The same. Act of 1868.

Sec. 34. The mechanic's lien law of 1868 is not open to the objection that it is unconstitutional on the ground that it attempted to appoint agents for private persons, nor that it confiscated property, nor as to notice required of owners as to responsibility for improvements, nor that it attempted to take away vested rights, or clothed private persons with power to divest citizens of their property. (*Hicks v. Murray*, 43 Cal. 515.)

The constitutionality of the lien act of 1868 was again raised in *Whittier v. Wilbur*, 48 Cal. 175. It was there argued that this law was unconstitutional because it prevented the owner from contracting with the builder that no lien should be created on the building, and permitted materialmen to compel the owner to pay more than the contract price, and made the contractor the agent of the owner.

In answer to this argument the court said:

"We can see no constitutional or other objection to a statute securing a lien to a materialman for the value of the materials which have gone into a building, provided the aggregate liens do not exceed the contract price as fixed by the owner and contractor."

This act did not violate the provisions of the constitution which provides that "all laws of a general nature shall have a uniform operation," because it failed to give liens to laborers other than those working on mining claims. (*Quale v. Moon*, 48 Cal. 478.)

CHAPTER III.

DEFINITIONS OF TERMS.

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The statute.

Sec. 35. Section 1183 of the C. C. P. *inter alia*, provides:

"Mechanics, materialmen, [85] contractors, subcontractors [85], artisans, architects, [85] machinists, builders, miners, and all persons [85] and laborers of every class, performing labor upon or furnishing materials to be used in the construction, alteration, [87] addition to [87], or repair. [85] either in whole or in part [85], of any building" etc., "shall have a lien," etc.

(For section 1183 in full, amendments thereto, notes thereon and explanation of figures and brackets, see note 1 to sec. 1, *supra*.)

Comments. Division of subject.

Sec. 36. In order to present the subject under consideration with as much clearness as possible, it is deemed necessary to define some of the terms used in the lien law, and to ascertain, from the statute and the decisions, among other things, who are "owners," "contractors," "subcontractors," "materialmen" and "laborers," and what are "improvements" and "structures" within the meaning of that law.

Section 1183, a part of which has just been quoted, expressly names nine classes of persons to whom it gives the right to claim liens for labor and materials, and provides generally that "all persons and laborers of every class," shall have liens for their labor and materials.

Notwithstanding the special enumeration of these different classes of persons, the reason for which is not material here, they are reducible to four general classes which are expressly recognized by subsequent sections of the lien law and more particularly by section 1194 of the C. C. P. This section declares the rank of the liens for which it provides, as follows:

- "1. All persons performing manual labor in, on or about the same; (the property);
- "2. Persons furnishing materials;
- "3. Subcontractors;
- "4. Original contractors."

This classification corresponds with that recognized by the courts (Hinckley vs. Field B. Co., 91 Cal. 139, 27 P. 594), and is sufficiently accurate for the purpose of discussing the rights, duties and liabilities of the owner and of other persons mentioned in the lien law.

The "owner." Various uses of term.

Sec. 37. To designate the owner of the property or of the estate or interest therein upon which a lien may be claimed, the statute uses several different terms. In section 1183 he is called "owner" and "reputed owner;" in section 1184, "the person who contracted with the contractor" and "reputed owner;" in section 1185, "the person who caused said building * * * to be constructed," etc.; in section 1187, "the owner of any property" and "owner;" in section 1191, "reputed owner," and in sections 1192, 1193, 1200, 1201, 1202 and 1203, "owner."

The use, by the legislature, of these several different terms to designate the person whom, under the circumstances we shall call "owner," was not unintentional, though it must be admitted, there is want of accuracy in the choice of words.

In subsequent sections of this volume it will be necessary, in some instances, specially to point out the meaning of the word "owner" as used in particular sections of the lien law, but notwithstanding this fact, it is believed the subject warrants a general presentation.

Who is "owner" generally.

Sec. 38. The general and accepted meaning of the word "owner," as applied to real property, is, any person who has the usufruct, control or occupation of land, whether

his interest is an absolute fee or an estate less than a fee. (17 Am. & Eng. Ency. of Law, p. 299, 1st ed.)

By the Civil Code of this state (sec. 654,) "ownership" is defined to be the right of one or more persons to possess and use a thing called property to the exclusion of others.

Phillips (Mec. Liens, Sec. 40, 2nd ed.) says that, as a general rule, "owner" is the correlative of contractor, and means the person who employs the contractor and for whom the work is done under the contract.

The subjects of ownership contemplated by the lien law are the building, structure or other improvement on the one hand, and the land or some estate therein on the other. In a majority of cases the owner of the building, structure or other improvement, is also the owner of the land upon which it has been constructed. In some instances, however, buildings, structures and other improvements have been erected by tenants, upon land held by them under leases from the owner of the fee. Again, cases may arise where the person who causes the building, structure or other improvement to be constructed, has no estate in the land upon which the building, structure, or other improvement, has been erected, beyond an estate for years or a mere right of possession (Guy v. Carriere, 5 Cal. 511; McGreary v. Osborne, 9 Cal. 119; Lothian v. Wood 55 Cal. 159; chap. VI, secs. 96 *et seq.*, *infra*.)

In the cases just stated it is entirely correct and strictly within the lien law to designate both, or all of the persons as "owners." In the case of a lease, the lessee who constructs a building upon leased land is the owner of the building and is also the owner of an interest or estate in the leased land, (Johnston v. Dewey, 36 Cal. 623). The lessor as reversioner is also an "owner" of the land.

Who is owner within section 1183.

Sec. 39. If we turn to section 1183, the basic section of the lien law of this state, it will be found that by that section the persons therein named are given liens "upon the property upon which they have bestowed labor or furnished materials." It does not expressly give a lien upon the land upon which the building, structure or other improvement has been constructed. Section 1185 of the same code makes the land, or the interest therein of the person who caused the building or improvement to be constructed, "also" subject to the lien.

The "owner" within the meaning of section 1183 is, therefore, the person who causes to be constructed and who owns the building, structure, or other improvement as distinguished from the "owner" of the land, or of some interest or estate therein, upon which the building, structure or other improvement has been constructed. (*Mc Greary v. Osborne*, 9 Cal. 119; *Lothian v. Wood*, 55 Cal. 159; *March v. McCoy*, 56 Cal. 85; *Hinckley v. Field B. Co.*, 91 Cal. 136, 27 P. 594; *Johnston v. Dewey*, 36 Cal. 623.)

Who is owner within section 1185.

Sec. 40. As stated in the last section of this chapter, section 1185 is the sole legislative authority for the right to a lien upon the land, or the interest or estate therein of the contracting-owner, upon which "any building, improvement or structure" is constructed. This section itself defines the meaning of the word "owner" impliedly used in it. It designates him as the "person who caused said building," etc., to be constructed, and expressly provides that if he owns less than a fee simple estate, then only his interest therein is subject to the lien.

Under this section, therefore, the "owner" is the person who caused the building, etc., to be constructed, and who, has an estate or interest in the land upon which the build-

ing, etc., has been constructed, and who, to use a shorter and apter term, may be called "contracting-owner." (*Johnston v. Dewey*, 36 Cal. 623; *Worden v. Hammond*, 37 Cal. 61; mortgagee in possession, *Ferguson v. Miller*, 6 Cal. 402; see chap. VI, sec. 102 *et seq.*, *infra*.)

Who is owner within section 1192.

Sec. 41. The "owner" mentioned in section 1192 may or may not be the owner of the fee. If he is the owner of the fee and is also the contracting-owner, or the person who caused the building, etc., to be constructed, the fee is made subject to the lien by section 1185. But, as we have seen, where a lessee, or some other person, who has an estate less than a fee in the land, erects a building thereon, the interest or estate of the lessee, or of such other person, only is primarily subject to the lien. (*Worden v. Hammond*, 37 Cal. 61.)

Section 1192 was enacted, among other things, for the purpose of foreclosing, so far as possible, questions of title to the land upon which the building has been constructed and of making it the duty of the owner of the reversion, or the owner of any other estate or interest in the land (who is not the contracting-owner) to give notice of non-responsibility in order to prevent the lien from attaching to his interest or estate in the land.

That this section does not apply to the contracting-owner is plain. Under its provisions the "owner" may give notice of non-responsibility and thus prevent the lien from attaching to his land, or to his interest or estate therein. In a case where the person who caused the building to be erected was the owner of the fee, he could, if the provisions of section 1192 applied to him, prevent the lien from attaching to his land, or to his estate or interest therein, by giving the required notice, and thus defeat the very object of the other provisions of the statute which is to subject the land, or the interest or estate therein of the contracting-owner, to the lien. (See *Jordan v. Myres*, 58 P. 1061.)

The "owner," therefore, who is required to give the notice provided for in section 1192, in order to prevent the lien from attaching to his land, or to his interest or estate therein, is the reversioner, or the owner of that interest or estate in the land which is not owned by the contracting-owner, and who, in the case of a lease, is the lessor, and not the lessee who caused the building to be constructed.

(See sec. 106 *et seq.*, *infra*, as to the various persons who are owners within this section.)

Who is reputed owner within sections 1183, 1184 and 1191.

Sec. 42. In 1887 (stat. p. 153) sections 1183, 1184 and 1191 were amended, among other particulars, by substituting "reputed owner" for "owner" wherever the latter word occurred in those sections; but it is clear that these amendments did not substitute another and different person. The amendments, at most, only removed some doubts, perhaps, as to the person upon whom notice must be served, and as to the actual ownership of the land upon which the building structure or other improvement was constructed. There can be no doubt that the "owner" referred to in section 1184 as it stood under the amendment of 1885 (stat. 144) was the person with whom the contractor contracted for the building or improvement, or, in other words, the contracting-owner. The amendment of 1187 has made this clear. By this amendment the "reputed owner" is described as the "person who contracted with the contractor." Any other construction of this, or any of these sections, would lead not only to absurd results but would render them unconstitutional. (*Santa Cruz etc. L. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097, overruling *S. C.* 43 P. 599, where under a contract with the reputed owner, it was sought to enforce liens against the estate or interest in the land of the real owner.)

Section 1184 treats of contracts for buildings, structures and other improvements and gives a sort of garnishment to

the lien-claimant by which he can reach the contract price in the hands of the person legally liable to pay the same. The contract is between the contractor and the contracting-owner, and the only person liable for the payment of the contract price is the contracting-owner. In order, therefore, to give this section effect "reputed owner" must be construed to mean the "person with whom the contractor contracts," or, in other words, the contracting-owner.

Section 1191 of the C. C. P. gives a lien to any person who, at the request of the "reputed owner" of a city or town lot, grades, etc., the same, or the street or sidewalk in front of or adjoining the same, etc.

What has been said *supra* is applicable to this section as well as to section 1183 of the same code. The "reputed owner" of section 1191 is the person who "requests" the grading, etc. The relation of the parties here is one of contract, and the "reputed owner" is the contracting-owner, and in order to give a lien, the contracting-owner must be the real owner of the lot, (*Santa Cruz etc. L. Co. v. Lyons supra*) or of some interest or estate therein and such interest or estate only is subject to the lien.

Who is owner within the other sections of the lien law.

Sec. 43. The term "owner" is used in other sections of the lien law. Section 1187 requires the owner to file for record notice of completion of the work and also that the claim of lien shall set forth the name of the owner or reputed owner of the property. Section 1193 provides for the settlement of the contract price between the owner and the contractor. Section 1200 for the abandonment of the contract by the contractor, the application of the contract price and the rights of the owner. Sections 1201 and 1202 are designed to prevent the contractor and owner from impairing the rights of lien-claimants to their liens and from making false statements of the contract price, and

section 1203 subjects the owner and contractor to a joint and several liability if the bond required by that section is not given and filed for record with the contract.

In all these cases the term "owner" means the contracting-owner, or the person who contracted with the contractor, except as to the statement of the name of the owner in the claim of lien, when the original contracting-owner has transferred the property. In *Corbett v. Chambers*, 109 Cal. 178, 41 P. 873, the rule was laid down that if the "owner" during the construction of the building, transfers the property, it is the duty of the lien-claimant to state in his claim, the name of the grantee of the original owner and not that of the original owner who had ceased to have any interest in the property. The rule is that the name of the owner at the time the claim is filed should be stated in the claim.

Contractor. Meaning of term.

Sec. 44. The term "contractor" is a word of broad signification, and is defined to be a person who enters into a contract. As thus defined it includes laborers and materialmen as well as every other person who performs labor for, or furnishes materials to, the owner of the building, structure or other improvement. But from the statute taken as a whole, it is evident that the legislature intended, by the term "contractor," to designate a particular class of persons, or contractors, as distinguished from the other classes of persons, laborers, materialmen, etc., who may have contractual relations with the owner or with the contractor; (*Hinckley v. Field B. Co.*, 91 Cal. 139, 27 P. 594); and that as used in section 1183, "contractor" is the equivalent of "original contractor." Or to state it differently, that the "contractor" mentioned in section 1183 is the same person called "original contractor" in section 1187 (providing the time within which claims of lien must be filed for record,) and in subdivision 4, section 1194, which declares the rank of liens.

Status of original contractor. Rights and liabilities depending on.

Sec. 45. The status of persons performing labor or furnishing materials, or both, for or in the construction of buildings or other structures and improvements, is an important matter. If there is an original contract, the lien extends to the entire contract price and operates as a lien in favor of all persons, except the contractor. (Sec. 1183 C. C. P.)

If the price exceeds one thousand dollars, the contract must be in writing, subscribed by the parties and filed for record; otherwise, the contract is wholly void, and the property of the contracting-owner is made subject to liens for the value of all work done and materials furnished irrespective of the terms and price of the contract between the contracting-owner and the contractor.

Section 1184 provides for the payment of the contract price of such contracts and makes the property of the contracting-owner subject to liens for the value of all work done and materials furnished, if the terms and time of payment of the price are made otherwise than in accordance with the provisions of that section.

In the cases just stated and by the same sections of the lien law, the contractor is denied the right to claim a lien at all.

Again, section 1187 prescribes different times within which the original contractor and every other person must file their respective claims of lien. Section 1193 of the same code limits the amount of the recovery of the contractor against the owner and imposes upon the contractor the duty of defending actions brought to enforce liens, and permits the owner to deduct from the amount due the contractor, the amount of judgments and costs establishing liens against his property. Section 1194 of the same code declares the rank of the lien of the "original contractor" and places it in the last or fourth rank.

The same.

Sec. 46. On the other hand, contracts of subcontractors, materialmen and laborers, the price of which exceeds one thousand dollars, are not required to be in writing, subscribed by the parties or filed for record pursuant to the provisions of section 1183. (See sec. 149 *et seq.*, *infra*.)

The provisions of section 1184 requiring that the contract shall contain stipulations making the price payable in installments at specified times or upon certain events, have no application to such contracts. (See sec. 167, *et seq.*, *infra*.)

It will thus be seen that if the original contract is invalid under section 1183 or in violation of section 1184, or, if the supposed original contractor is not in fact an original contractor, then different rights and remedies are given and provided by the lien law to perfect and enforce the liens of claimants against the property of the contracting-owner, and different and more onerous liabilities and duties are imposed upon the owner. The first thing to be determined in every case is, therefore, the status of the lien-claimant, that is, whether he is an original contractor on the one hand, or a subcontractor, laborer or materialman on the other. The rules to be followed in determining this status are those laid down by the Supreme Court. These follow.

Who is original contractor. The test. Direct contract with materialman.

Sec. 47. In *Sparks v. Butte Co. G. M. Co.*, 55 Cal. 389, the defendant (owner), contracted directly with the plaintiff (materialman), for material to be used in the construction of defendant's building. Plaintiff furnished the material according to his contract, the building was completed and plaintiff filed his claim of lien for materials after thirty but within sixty days after the completion. It was argued by the defendant and held by the court that plaintiff was not an original contractor and that he should, therefore, have

filed his claim of lien within thirty days after the completion of the building.

The test adopted by the court to determine the status of plaintiff was whether or not those employed by plaintiff in the preparation of the material which he furnished, could, by reason of such employment, have acquired liens upon the building of defendant as subcontractors. If they could, plaintiff was an original contractor, and if they could not then plaintiff was a materialman and not an original contractor.

The court, at page 291, say it was clear that such employed persons could not acquire such liens, and that, therefore, it was unnecessary to designate plaintiff as an original contractor in order to distinguish him from the subcontractors, and proceed:

“If every person who furnishes materials to the owner to be used in the construction of a building is an original contractor, then every person directly employed by the owner who works on the building is likewise an original contractor, and in a case in which the owner purchased all the material used in the construction of, and employed all the men who worked upon, the building, all who furnished such materials or performed such labor, would be original contractors.”

The court then point out the very serious complications which would result from the adoption of such a rule and among which and in addition to those above stated, is, that as such original contractors, the materialmen and laborers would all have to be held to be the agents of the owner under and for the purposes of section 1183. (See *Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 51 P. 555; *Bennett v. Davis*, 113 Cal. 338, 45 P. 684.)

Who is original contractor. The test. Direct contract with laborer.

Sec. 48. In *Malone v. Big Flat G. M. Co.* 76 Cal. 585, 18 P. 772, the defendant (owner) employed one Ah Jake and agreed to pay him fifty dollars per month for his indi-

vidual labor and one dollar per day for the labor of a certain class and one dollar and twenty-five cents per day for another certain class which he was to furnish. Ah Jake performed his individual services and furnished the other labor according to his agreement, filed a claim of lien for the amount due him for his individual labor and also for the amount due him for the labor furnished, and assigned his claim to the plaintiff who brought this action to foreclose the lien.

The point was made that Ah Jake could not have a lien for the labor furnished by him; that the laborers so furnished by Ah Jake should have filed liens themselves; and that there could not be two liens for the same labor.

The court, answering these points, page 585, say:

"It will be observed that the contract stated * * * that the sum to be paid for laborers furnished by Ah Jake was to be paid *to him*. He was the original contractor and the laborers were the subcontractors. And we think he was as much entitled to a lien as any other original contractor * * *. It is no objection that the subcontractors could also file liens. That is the case whenever a subcontractor files a lien. * * * If the transaction * * * (had been) that Ah Jake simply acted the part of an employment office, and that the company (defendant) was liable directly to the laborers, he (Ah Jake) would not have been entitled to a lien for their labor."

Who is original contractor. The test. Intermediate lienors.

Sec. 49. In *La Grill v. Mallard*, 90 Cal. 373, 27 P. 294, plaintiff made a contract with the defendant (owner) whereby plaintiff was to paper with paper decorations, the walls and ceilings of certain rooms of defendant's buildings, and to furnish the labor and materials therefor for which defendant agreed to pay plaintiff the reasonable value when the work was completed.

Plaintiff performed the work and furnished the materials according to his contract, filed his claim of lien therefor on the building after thirty but within sixty days after completion of his contract, and brought this action to foreclose the lien. It was contended by the defendant that plaintiff was not an original contractor and that, therefore, since he had not filed his claim of lien within thirty days after the completion of the work, he had lost his lien.

The Supreme Court overruled this contention and said:

“Under this contract men working for plaintiff in the decoration of this house would have been entitled to their laborers’ liens, and that too, under section 1194 of the C. C. P., prior to the satisfaction of any lien filed by plaintiff. Plaintiff and his employees both being entitled to liens, in order to distinguish their *status*, the former must unquestionably be designated as original contractor.

“These views are not in hostility to the case of *Sparks v. Butte G. M. Co.*, 55 Cal. 389, *supra*, or to *Schwartz v. Knight*, 74 Cal. 432, *infra*. Indeed, the case of *Sparks v. Butte Co.*, is in line with the foregoing views; for the test as there defined is: If there could be intermediate lienholders for work done or materials furnished, then plaintiff here would be a contractor.

“We have already seen that such a result might follow in this case, and measured by the foregoing test, the plaintiff is an original contractor, and filed his notice of lien within the statutory time.” (See *Bennett v. Davis*, 113 Cal. 338, 45 P. 684.)

Who is original contractor. Mere materialman is not.

Sec. 50. *Schwartz v. Knight*, 74 Cal. 432, 16 P. 235, referred to in the last section, was an action to foreclose the lien of a materialman for materials furnished by him and used by the defendant in the construction of his dwelling-house. The facts were these: The defendant commenced the construction of the house of which he was the owner.

During the construction, plaintiff furnished her materials to be used and which were used, of the value of \$728.25 for which defendant promised to pay plaintiff. The carpenters finished their work on the house in January, 1884, but the house was not then, nor at the time of the trial (September, 1884) completed. On May 10, 1884, plaintiff filed his claim of lien for record and commenced this action June 20, 1884.

The court held that plaintiff was not an original contractor but a materialman and that his claim of lien was prematurely filed since the work had never been completed. (See *Baird v. Peall*, 92 Cal. 235, 237, 28 P. 285, *infra*.)

Who is original contractor. Contracts for both labor and material.

Sec. 51. In *Baird v. Peall*, 92 Cal. 235, 28 P. 285, plaintiff entered into a contract with the owner to paint his building. By the contract the paint to be used was to be of a certain kind to suit the owner. Having completed his contract and filed his claim of lien for record, plaintiff brought this action to foreclose the lien.

The contract price for the painting was \$390 and by the terms of the contract plaintiff was to accept a certain lot of land, as part payment, to the extent of \$150.

It was contended upon appeal that this contract was void because the whole price was not payable in money as required by section 1184.

The court, at page 237, say:

"I think that plaintiff was an original contractor within the meaning of sections 1184, 1187 and 1194 * * * and therefore within the exceptions expressed in the above quotations from section 1184 [that as to all liens except that of the contractor, the whole contract price shall be payable in money, citing *La Grill v. Mallard*, *supra*.] His contract was to paint the hotel and of course to furnish the necessary materials for that purpose. The cases of *Sparks v. Butte Co.* and *Schwartz v. Knight*, *supra*, cited by appellant, are not in point, as in

those cases, liens were claimed simply for materials furnished. Had the plaintiff contracted to do the work in consideration that defendant should convey to him certain land or personal property, without fixing the money price, or value of the work, perhaps he would not have been entitled to a lien; but the money price of the whole work is fixed by the contract, though a specified portion of that price (\$150) is to be paid in land."

Who is original contractor. Distinct contract for different departments of work.

Sec. 52. Where a building is constructed by the owner under distinct contracts for the different departments of work involved therein, each person contracted with is an original contractor. (*Pacific Mutual L. I. Co. v. Fisher*, 106 Cal. 224, 39 P. 758.)

In the last case Merritt made a contract with Fisher, owner, to do the work of plumbing and to furnish the materials therefor. It would appear that Fisher had made other contracts with other parties to do distinct portions of the work in the construction of the building. It was argued by the owner, defendant, that Merritt was not an original contractor and that his claim of lien was invalid because filed before the completion of the whole building though within sixty days after the *completion of his contract*.

In reply to this argument, the court, at page 232, say:

"Merritt was, however, an 'original contractor' for this portion of the construction of the building, and under the terms of section 1187 * * * could file his claim of lien 'within sixty days after the completion of *his contract*,' irrespective of the time when the building was completed.

"The chapter in the code relating to mechanics' liens does not contemplate that there can be no original contractor except for the entire work of constructing the building. For the purpose of constructing the building the owner may enter into

different original contracts for the different departments of work involved therein. If he should enter into a contract with one person for the construction of the building in all its parts, except the painting, and should afterwards enter into a contract with another person to do the painting of the building, each of these individuals would be an original contractor, within the meaning of the statute, and it would be immaterial whether the latter contract was entered into prior or subsequent to the completion of the former one."

Where original contract is void subcontractor does not become original contractor.

Sec. 53. In *Coss v. McDonough*, 111 Cal. 662, 44 P. 325, the original contract was void because not filed for record, the price exceeding one thousand dollars. Grubb, one of the plaintiffs under contract with the original contractor, furnished labor and materials for the building in question. In his claim of lien filed for record, he set up a contract between himself and the contractor, and in his complaint alleged a contract between himself and the owner. It was held, however, that Grubb was not an original contractor but was entitled to recover under section 1184.

When the original contract is void because of failure to record the plans and specifications, there is no original contractor in contemplation of the statute. (*Pierce v. Birkholm*, 115 Cal. 657, 47 P. 681).

Who is materialman. Term defined and distinguished.

Sec. 54. The legislature in enacting the mechanics' lien law of this state has used the word "materialman," but it has not defined its meaning. This word has been and is in common use among builders, and has a well known signification. It is defined to be one who furnishes materials to be used in the construction or erection of ships, houses or buildings. (*Bouvier's Law Dict.*)

This definition, however, omits one thing which both by the lien law and the decisions of the court, is made essential to constitute a materialman under that law. Section 1183 gives the materialman furnishing materials "to be used in the construction, alteration, addition to, or repair or any building," and the other structures and improvements therein mentioned, a lien upon the property for which he has "furnished materials" for the value of the materials furnished.

The materials, therefore, must, under the statute, have been furnished for the particular building upon which the lien is claimed, and they also must have been used in the same building for which they were furnished. (Sec. 91 and 91a, *infra*.)

The same.

Sec. 55. The term "materialman" found in section 1183 and in subsequent sections of the lien law of this state, is used in opposition to "original contractor," "subcontractor" and "laborer" also found in those sections, and each of these terms is used to designate a class distinct and separate from the other classes.

The materialman who merely furnishes materials for a building, must not, therefore, be confounded with the contractor who furnishes both materials and labor for and who constructs the building; nor, with the laborer who furnishes his *individual* labor only upon the building. Nor, must the common and the statutory meaning of the word "materialman" be lost sight of when the person who furnishes the materials also, and by the same contract, furnishes or performs labor upon and in the construction of the building for which he furnishes the materials. In such cases the persons who furnish materials cease to be materialmen and become original contractors or subcontractors as the facts of the case may be.

The materialman then, within the meaning of the lien law, is a mere furnisher of materials which have been fur-

nished by him to be used and which have been used in the construction of the particular building or other structure or improvement mentioned in section 1183, upon which a lien is claimed by him for such materials. (See sees. 91, 91a, *infra*.)

Who is materialman. Application of rule.

Sec. 56. There are no difficulties presented in defining the term "materialman." The definition is clear and exclusive. Perplexities, however, are apt to arise in the application of the definition to the facts of particular cases: for when, in a contract for furnishing materials, there is added the element of labor upon the building for which and in the use of which the materials are furnished, or when the contract for furnishing materials also includes the "construction" of the whole, or some part or portion of the building, the persons thus contracting, as we have shown, lose the character of materialmen and become original contractors or subcontractors. The extent and kind of labor as well as the extent and kind of "construction" which will place the person so contracting in the one or the other class, has, by the decisions of the Supreme Court, been made the criterion for determining this question. These decisions follow.

Who is materialman. The test. Intermediate lienors. Direct contract.

Sec. 57. In *Sparks v. Butte etc. Co.*, 55 Cal. 389, the defendant, materialman, furnished materials to the owner, under an express contract directly with him, to be used and which were used in the construction of the owner's building. The materialman did not file his claim of lien within thirty days, but did file it within sixty days after the completion of his contract, and it was contended that he had lost his lien because the claim was not filed in time.

In disposing of this contention, the court, at page 391, lay down the following as a test to determine whether the person who had furnished the material in question was an original contractor or a materialman:

"It is quite clear that no one employed by him (materialman) in the preparation of the materials which he furnished, or from whom he obtained them, could by reason thereof have acquired a lien upon the building as a subcontractor. It is unnecessary, therefore, to designate him as an original contractor for the purpose of distinguishing him from a subcontractor * * *. Unless the persons who worked for appellant (materialman) upon the materials which he furnished to the defendant (owner) would have a lien upon the building in the construction of which they were used, for the value of their labor, then he is not a concontractor within the meaning of that clause of the code."

It was therefore held that the lien-claimant was a materialman and not an original contractor and that his claim of lien was not filed in time. (*Schwartz v. Knight*, 74 Cal. 432, 16 P. 235.)

So where the owner (lessee) contracts directly with the materialman for materials for a building which the former is causing to be constructed, the latter is a mere materialman and not an original contractor. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555.)

Who is materialman. Contract of construction or of sale of materials.

Sec. 58. The contract in *Bennett v. Davis*, 113 Cal. 388, 45 P. 684, as alleged in the complaint, was that the plaintiffs contracted and agreed with the defendants to furnish in the addition to, and in the alteration of, the building theretofore erected on the premises in question, certain materials, towit, mantels, and grates and the appurten-

ances thereof; and also the labor required in the addition of the same to, and the erection of the same in, said building as a part thereof, etc.

The sole question before the court was whether plaintiffs were materialmen or contractors in purview of the lien law, and the court say that the determination of this question depends upon the fact whether the contract was one of sale or for the manufacture of goods. In determining the last question the rule is laid down that the main consideration is whether the labor bestowed upon placing the materials in the building, is trifling in comparison with the price of the materials, or whether the materials are trifling in comparison with the labor.

After reviewing *Hinckley v. Field B. Co.*, 91 Cal. 136, 27 P. 594, and *La Grill v. Mallard*, 90 Cal. 373, 27 P. 294, *supra*, the court, at page 340, say:

"I see little difference in the cases, save in the relative amounts of material and labor. In the last case the contract was to decorate as well as to hang paper, and further, the defendant (owner) promised to pay for the labor in decorating the building. The materials used in decorating a room may be very trifling in comparison to the labor * * *.

"The labor required to place the engines and machinery in proper position in the case of *Hinckley v. Field Biscuit Co.*, *supra*, was evidently much greater than the labor performed in *La Grill v. Mallard*, *supra*, but relatively to the material furnished, was not only the principal thing, but compared to it, the work was trifling. In the other, the work was the important thing."

It was held that plaintiffs were materialmen and not original contractors. (See *Bryson v. McCone*, 121 Cal. 153, 55 P. 637.)

Who is materialman. Contract to furnish machinery. Manufactured material.

Sec. 59. A contract for the furnishing of an electrical plant, consisting of electrical apparatus and machinery necessary to be used in the construction of electric light works, by the terms of which the purchaser of the plant is to erect the necessary building to receive it, and to build a powerhouse for connecting power with the machinery, and to construct the pole line required in transmitting and distributing the light, and the title to the plant is reserved until fully paid for, does not constitute the furnisher of the plant an original contractor, within the meaning of the statute, but the relation of such furnisher is that of a mere materialman. (*Roebling Sons Co. v. Humboldt etc. Co.*, 112 Cal. 288, 44 P. 568.)

The fact that the party furnishing the plant was, by the terms of the contract, to put in the foundation upon which to set the dynamos, and furnish the skilled labor necessary for that purpose, and also to set up and connect the machinery, and install the incandescent lamps, does not alter the nature of the contract as being one for the furnishing of materials, or change it into a contract for construction. (*Id.*)

In this case, at page 291, the court say:

"The work done by them on the premises of defendants, in placing them in position, was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute. The contract was essentially one to furnish materials for the factory, and not a building contract."

(See *Hinckley v. Field etc. Co.*, 91 Cal. 136, 140, 27 P. 594; *Bryson v. McCone*, 121 Cal. 153, 53 P. 637; *Bennett v. Davis*, 113 Cal. 337, 45 P. 684.)

One who has a contract with the contractor to furnish all the mill work required for the erection of a building, con-

sisting of manufactured materials to be delivered at the building, is a materialman only, and not a subcontractor, and one who furnishes doors, sashes, blinds and other stock material to such materialman cannot claim a lien upon the building for the materials so furnished. (*Wilson v. Hind*, 113 Cal. 357, 45 P 695.)

Summary of the decisions.

Sec. 60. The decisions clearly and correctly decide that one who merely furnishes materials, whether to the original contractor, to the subcontractor, or directly to the owner, is a materialman, and not an original contractor. (*Sparks v. Butte etc. Co.*, sec. 57, *supra*; *Schwartz v. Knight*, sec. 50, *supra*.)

And there is no doubt that, under the lien law of this state, a laborer is one who furnishes his individual labor. (Sec. 63, *infra*.)

The statute and the decisions with equal clearness show that an original contractor is one who, under direct contract with the owner, either,

1. Furnishes materials *and* labor to the owner, and builds, that is, constructs, alters, adds to, or repairs, one of the improvements mentioned in the statute, (*La Grill v. Mallard*, sec. 49, *supra*; *Baird v. Peall*, sec. 51, *supra*), or,

2. Furnishes labor to the owner other than or in addition to that of his own, the compensation for which is, by the contract, made payable to him. (*Malone v. Mining Co.*, sec. 48, *supra*.)

The court in the decisions from which these rules have been formulated has named certain tests by which to determine the status of the lien-claimant:

1. In order to give to the lien-claimant the status of original contractor, he must have a direct contract with the owner. This test is self evident.

2. There must be intermediate lien-claimants, that is, there must be the right upon the part of persons employed or who may be employed by, or under contract, or who may

be under contract with the original contractor, to claim liens for their labor or their material. (Secs. 47, 48, 49, 51, *supra*.)

Original contractor and materialman. Summary of the decisions.

Sec. 61. It is believed that by the rules and tests given in the next preceding section, the status of all persons claiming liens may be determined, except possibly of those who furnish what is sometimes called "manufactured materials." The difficulty in determining the status of the persons who furnish such materials to the owner grows out of the very nature of the transaction. The question in every case is whether the contract is one of sale or of construction. If it is one of sale, the seller is a mere materialman. If it is one of construction, then the constructor—the builder,—is undoubtedly an original contractor.

In solving this question, the courts have resorted to the rule of construction, which obtains in the law relating to the statute of frauds, and have declared that the test is furnished by the relative amount of labor required in putting the "manufactured material" in its proper place in the building, or other structure or improvement. (*Bennett v. Davis*, 113 Cal. 337, 45 P. 684; *Flynn v. Dougherty*, 91 Cal. 669, 27 P. 1080.)

In *Bennett v. Davis*, *supra*, the rule is thus stated:

The main consideration in determining whether the contract is one of construction, or sale of material, is whether the labor bestowed upon placing the materials in the building is trifling in comparison with the price of the materials, or whether the materials are trifling in comparison with the labor. And the conclusion is drawn that if the labor bestowed in placing the materials in the building is trifling in comparison with the price of the materials, the seller is a materialman, and if the materials are trifling in comparison with the labor, then the furnisher is an original contractor. (See secs. 58 and 59, *supra*.)

Who is subcontractor.

Sec. 62. Section 1183 names "subcontractors" as one of the classes of persons entitled to liens. We have seen that the original contractor is the person who, among other things, contracts directly with the owner for labor and materials. (Sec. 60, *supra*.) The owner may, however, contract directly with materialmen for their material or with laborers for their individual labor, but such contract would not be an original contract within the purview of the lien law. (See secs. 54 *et seq.*, *supra*.)

The term "subcontractor" implies the existence of another contractor who has already contracted for the performance of the work and since, under the lien law of this state, the "original contract" is the only one distinctly recognized between the owner and his contractor, it follows that a "subcontractor," within the lien law, is a person who has entered into a contract with the original contractor.

The term "subcontractor" however, implies more than a mere contract with the original contractor. Laborers and materialmen may have contracts with the original contractor for either their individual labor or their materials, but such contract would not make them subcontractors. To be a subcontractor, such person, under contract with the original contractor, must furnish for the work called for by the original contract, something in addition to his individual labor, or his materials. In other words, he must perform the original contract, or some part of the "work" called for by it. He is a "constructor" not a mere "furnisher."

It follows that if there is no original contractor, there can be no subcontractor and there is no necessity, in such case, for the existence of this class of lienors, since such persons would be entitled to liens for their work or materials, or both, by virtue of other provisions of the lien law.

Section 1192 as originally enacted upon the adoption of the Code of Civil Procedure in 1872, provided that "all persons entitled to liens on the structure or improvement, except those who contracted with the owner thereof, are subcontractors," etc.

Who is laborer.

Sec. 63. The laborer to whom section 1183 gives the right to claim a lien for his work is the person who performs "labor upon * * * any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure," or "in any mining claim."

The distinction in the lien law between the materialman and the laborer is not unimportant. The materialman who claims a lien for his material must show that his materials were, by the terms of his contract, furnished to be used and used in the "construction, alteration, addition to, or repair" of the building or other structure or improvement upon which he claims his lien. (Sec. 91, *infra*.)

The laborer must perform his labor upon the particular building, or other structure or improvement upon which he claims his lien, but the labor for which he claims such lien is not limited to the "construction, alteration, addition to, or repair" thereof. (*Palmer v. Lavigne*, 104 Cal. 30, 37 P. 775.)

The laborer here referred to is the person who performs labor only. If, in addition to performing labor, he, by the same contract, furnishes materials which by his labor, or labor furnished by him, are used in the building, he is not, in the sense of the lien law, a laborer but an original contractor where he contracts directly with the owner for such labor and materials. (Sec. 48 *et seq.*, *supra*.)

The laborer in the purview of the lien law is a person who furnishes his *individual* labor only upon any of the buildings, or other structures or improvements enumerated in section 1183.

What is improvement.

Sec. 64. Section 1183 enumerates as the objects for which a lien may be claimed "any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure," and provides that the

materials for which liens are given must have been furnished to be used, and used "in the construction, alteration, addition to, or repair" of these objects or one of them.

In a subsequent portion of the same section the enumerated objects are grouped into "buildings or other improvements," and in subsequent sections they are designated as "building, improvement or structure."

It is evident that the term "improvement," as used in section 1187, is intended to embrace the several objects enumerated in the first part of section 1183 other than "building" and "structure."

By section 1184 the notice therein provided for is to be posted upon the "improvement," and by section 1185 the land upon which the "improvement" is constructed is made subject to the lien. In all these cases—and others might be mentioned—the term "improvement" is evidently used as equivalent to the object upon which the labor has been performed, and it would be an unwarrantable application of the term to construe it as equivalent to the labor itself or to that particular class of labor for which the claimant was employed. (*Davis v. MacDonough*, 109 Cal. 547, 42 P. 450.)

What is structure.

Sec. 65. The lien law of 1850 limited the structures on which claimants could obtain liens to buildings and wharves. Under this law no lien could be had on a bridge. (*Burt v. Washington*, 3 Cal. 246.)

So under the lien laws of 1855 and 1856, which gave liens upon "building, wharf or other superstructure," a ditch or canal was not a superstructure and was not, therefore, within the lien laws. (*Ellison v. Jackson W. Co.*, 12 Cal. 542; *Horn v. Jones*, 28 Cal. 204.)

In *Head v. Fordyce*, 17 Cal. 149, the question whether a flume was a superstructure under the lien law of 1856 was left undecided.

Neither wings nor seats are buildings or structures within the intent and meaning of sections 1183 and 1192 for which a corporation would be chargeable even with notice. (*Lothian v. Wood*, 55 Cal. 159.)

A mine or pit sunk within a mining claim is a structure within the meaning of section 1183 of the C. C. P. (*Helm v. Chapman*, 66 Cal. 291, 5 P. 352.)

For the purpose of filing claims for labor and materials furnished for buildings and improvements upon mining claims, the mining claim must stand in the place of the structure as the property to be charged with the lien. (*Williams v. Mining Co.*, 102 Cal. 134, 34 P. 702, 36 P. 388.)

The statute enumerates the particular property for the construction, etc., of which it gives the rights to liens. (See sec. 1, *supra*, and sec. 92, *infra*.) These "properties," for convenience, are classified as "buildings, other structures and improvements." (See secs. 1185, 1186, 1187, 1190, C. C. P.; secs. 3, 4, 5 and 8, *supra*.)

By the amendment of 1899 to sections 1183 and 1185 (stat. 1899, 23) "well" was added to the enumerated structures for the construction, etc., of which liens may be claimed.

There can be no lien upon a portion of a building or structure. (See sec. 101a, *infra*.)

CHAPTER IV.

PERSONS ENTITLED TO LIENS.

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The statutes.

Sec. 66. Section 1183 of the C. C. P., *inter alia*, provides :

- 1 Mechanics,
- 2 Materialmen,
- 3 [85] Contractors,
- 4 Subcontractors [85],
- 5 Artisans,
- 6 Architects,

- 7 [85] Machinists,
- 8 Builders,
- 9 Miners, and

10 All persons [85] and laborers of every class, performing labor upon or furnishing materials to be used in the construction, alteration, [87] addition to [87], or repair [85] either in whole or in part [85], of [a] any building, etc., shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished, etc.

The same section also provides :

"Any person who performs labor in any mining claim, or claims has a lien upon the same, and the works owned and used by the owners," etc.

Section 1191 provides :

"Any person who, at the request of the [87] reputed [87] owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street [85] or sidewalk [85] in front of or adjoining the same, [87] or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith [87], has a lien upon said lot for his work done and materials furnished." (As to the constitutionality of this section see sec. 33, *supra*.)

For sections 1183 and 1191 in full, amendments thereof, notes thereon and explanation of figures and brackets, see secs. 1 and 9, *supra*. By the amendment of 1885 to section 1183, the words "mining claims" were stricken out of that section at the place indicated by "[a]."

Comments on section 1183.

Sec. 67. Section 1183 expressly mentions nine classes of persons to whom it gives the right to claim liens for their labor and their materials. In addition to these classes this section provides generally that "all persons and laborers of

every class performing labor upon or furnishing materials to be used" in any building, etc., shall have liens. It would seem, therefore, that this section is sufficiently broad and comprehensive to include, as it says, "all persons and laborers of every class," and that the question of whether a particular person is entitled to a lien, is readily determined. And such it is so far as concerns the assigning of the particular person to his proper class, for it will be observed that the legislature has taken care to name every class of persons known to the building trades or usually employed in the construction of buildings or other structures and improvements, and about whom there could be doubt as to whether they would be included in the general expression of "all persons and laborers of every class."

The statute, therefore, leaves little or no room for discussing whether a particular person or laborer performing labor or furnishing materials to be used in the construction of any building, etc., is included in the classes enumerated in section 1183. But the fact that a lien-claimant belongs to one of the classes of persons enumerated in the statute, does not of itself entitle him to a lien for his work or his materials. In addition to belonging to one of the statutory classes, the lien-claimant must have performed labor or furnished materials for which the statute gives a right to claim a lien, and he must also have the statutory right to enforce that lien against the property of the owner.

A lien-claimant may belong to one of the statutory classes and have performed the labor or furnished the material for which a lien may be claimed and yet not be entitled to enforce such lien. One illustration will make this plain.

A and B enter into a contract by which A agrees to construct a house for B, the contract price of which is less than one thousand dollars. A employs C, a carpenter, to work for him upon the construction of the house. Upon completion of the house and in pursuance of and in accordance with the terms of the contract, B pays A the whole contract

price. A fails to pay C for his work and C files his claim of lien upon the house therefor within the statutory time.

Now, in such case, according to all the authorities (see secs. 75, 77; sec. 167; and sec. 303, *et seq., infra*), C is not entitled to a lien upon the house for his work performed upon it, because there was nothing due the contractor (A) from the owner (B) according to the terms of the contract, when C's claim of lien was filed for record, yet C is included in one of the classes of laborers to whom section 1183 gives the right to liens and C also performed labor of the kind which the statute makes lienable.

It may, therefore, be laid down as a rule that to entitle any person to a lien he must not only bring himself within one of the classes of persons designated in the statute, perform labor or furnish materials for which the statute gives a lien, but there must, also, be a liability on the part of the contracting owner to the contractor where there is a valid original contract, or a liability created, or imposed upon the owner by the statute, where there is no such contract. (See *Spinney v. Griffith*, 98 Cal., 149, 32 P. 974; *Davis v. MacDonough*, 109 Cal., 547, 42 P. 450; *Ellison v. Jackson W. Co.*, 12 Cal., 542, 555; *Burt v. Washington*, 3 Cal., 246.)

Generally.

Sec. 68. One who advances money to the contractor, although for the payment of materials and labor devoted to the erection of a building, is not entitled to a mechanic's lien. (*Godeffroy v. Caldwell*, 2 Cal. 489; *Cadenasso v. Antonelle*, 59 P. 765.)

A materialman is entitled to a lien although he is on the contractor's bond to the owner to secure the latter from loss on account of the default or negligence of the owner. (*Blyth v. Torre*, 38 P. 639; *Blyth v. Robinson*, 104 Cal. 239, 37 P. 904.)

A mere right to create a lien cannot be assigned by a lien-claimant. The assignee, therefore, of such a right is

not entitled to file or enforce a lien based upon such right. (*Mills v. LaVerne L. Co.*, 97 Cal. 254; 32 P. 169; *McCrea v. Johnson*, 104 Cal. 224, 37 P. 902; *Rauer v. Fay*, 110 Cal. 361, 42 P. 902; see sec. 330, *infra*.)

A person who performs labor upon and in the construction of a building, at the request of the contractor, is entitled to a lien thereon, under section 1183 of the C. C. P. (*Patent Brick Co. v. Moore*, 75 Cal. 206, 16 P. 890.)

So, one performing manual labor in and upon a mine is entitled to a lien thereon, though called the superintendent of the mine. (*Palmer v. Uncas Mining Co.*, 70 Cal. 614, 11 P. 666.) And so are persons employed in sinking a shaft on a quartz mining claim. (*Hines v. Miller*, 122 Cal. 517, 55 P. 401.)

But one who sells materials to a materialman can claim no lien therefor, as the statute makes no provision for a lien in such case. (*Roebeling Sons Co. v. Humboldt etc. Co.*, 112 Cal. 288, 44 P. 568; *Wilson v. Hind*, 113 Cal. 357, 45 P. 695; sec. 82, *infra*.)

General creditors of the contractor who are not lien-holders can neither have any recourse against the owner's property, nor any personal judgment against him, nor can such persons be declared included in an offer of the owner to pay the amount due the contractor to the persons claiming to be lien-holders in proportion to their respective claims, whenever the respective amount due each lien-holder is determined. (*Lumber Co. v. Priet*, 115 Cal. 98, 46 P. 903.)

Original contractor.

Sec. 69. The right of the original contractor and of all other persons to claim liens for their work or materials must be sought for in the statute itself. (See secs. 67, 68 *supra*.) If the statute has not given a lien to the particular person, or in the particular case, then none exists. As we shall more fully see in subsequent sections of this chapter, the statute has given a lien to the original contractor for

his work and materials only when he has a contract which meets the requirements of sections 1183 and 1184 of the C. C. P.

Section 1183, however, provides for, or permits, two different kinds of original contracts. If the contract price exceeds one thousand dollars, the contract must conform to the provisions of section 1183 and 1184, to entitle the original contractor to a lien.

But if the contract price does not exceed one thousand dollars, the contract does not come within the provisions of sections 1183 and 1184 with reference to formalities and stipulations as to price. (See secs. 146, 147 *infra*) and the original contractor under such contract is entitled to a lien to the extent of the contract price, or of the balance thereof, (*Dore v. Sellers*, 27 Cal. 588) unless, in either case, subcontractors, laborers and materialmen or some of them, serve upon the owner, the written notice authorized by section 1184, or file and establish their claims of lien, in which cases the contractor would be entitled to a lien only and in the event there was a balance of the price payable to him, according to the terms of the contract, after deducting the amount of the claims for which notices were served and claims filed. (Secs. 1183, 1193 C. C. P., secs. 1, 11 *supra*.)

This rule also applies to valid original contracts the price of which exceeds one thousand dollars.

When original contractor not entitled to lien.

Section 1183.

Sec. 70. Section 1183 provides: "In case of a contract for the work between the [87] reputed [87] owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor."

Subsequent provisions of the same section provide that such contracts shall be in writing when the contract price exceeds one thousand dollars, subscribed by the parties and filed for record, etc., and that if they are not in writing, subscribed by the parties and filed for record, etc., that "they shall be wholly void and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

In *Morris v. Wilson*, 97 Cal. 644, 32 P. 801, the plaintiff, (contractor), entered into a contract with the defendant (owner) for the construction of a building for a price in excess of one thousand dollars, but failed to have the contract filed for record. It was held that the contract was void because of failure to file it for record and that the contractor was not entitled to a lien for the value of the work and material furnished thereunder, because the contractor was expressly excepted, by the statute, from those persons who were entitled, in such case, to liens for the value of their work and materials. (See *Marchant v. Hayes*, 117 Cal. 669, 49 P. 840; *Holland v. Wilson*, 76 Cal. 434, 18 P. 412; *Spinney v. Griffith*, 98 Cal. 149, 32 P. 974; *Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860.)

Nor where the contract is void because not filed for record, is the contractor entitled to a lien, because he is entitled to recover upon a *quantum meruit* for services or upon a *quantum valebat* for goods. The contractor cannot have a lien independently of his valid contract because the statute (sec. 1183) expressly excepts him, in such case, from the persons to whom it gives the right to liens. (*Spinney v. Griffith*, *supra*.)

**When original contractor not entitled to lien.
Section 1184.**

Sec. 71. Section 1184 stated generally, provides *inter alia*, that the contract price shall, by the terms of the contract, be made payable in installments at stated times; that it shall not be made payable or paid in advance of the commencement of the work; that twenty-five per cent. of the whole price shall be made payable at least thirty-five days after the final completion of the contract; and that certain payments to the contractor shall be invalid for the purpose of defeating, etc., "any lien in favor of any person, except the contractor," etc.

Following these provisions, in the same section, is this clause:

[87] "In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons, *except the contractor*, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." [87.]

By force of this last clause, therefore, the contractor is denied the right to a lien, if his contract with the owner and the alterations thereof, do not conform substantially with the provisions of section 1184.

The cases cited in the next preceding section are in point here.

**Right of original contractor to lien depends
upon the performance of his contract.**

Sec. 72. The original contract may meet the requirements of section 1184 and comply with the provisions of section 1183, and, therefore, be valid, and yet the original contractor may not be entitled to a lien.

If a contract for the construction of a building, for instance, is entire and the price made payable upon com-

pletion of the contract, it is an elementary rule of law that the contractor cannot recover the price if he has not completed the contract according to its terms. (*Blythe v. Poultney*, 31 Cal. 234.) In such case there is no liability on the part of the owner to the contractor until the latter has performed his part of the contract. (See *Marchant v. Hayes*, 117 Cal. 669, 49 P. 840; *Cox v. Railroad*, 44 Cal. 18; *Dingley v. Green*, 54 Cal. 333; *Anderson v. Johnston*, 120 Cal. 657, 53 P. 264; sec. 199 *et seq.*; sec. 307 *et seq.*, *infra*.)

Sections 1183 and 1184 recognize the common law contract and the rights and liabilities growing out of it. It was not the intention of the legislature by the special limitation upon, and requirements concerning, contracts found in these sections, to abrogate the common law contract, nor to interfere with the personal rights and liabilities which follow the performance or the breach of such contract, but rather thereby, to require contracts for the construction of buildings and other structures and improvements to contain such stipulations and restrictions as would make them conform to the scheme for securing liens to laborers, materialmen and others whereby the rights of all persons concerned would be safely protected and guarded.

This seems to be the correct interpretation of the statute, and it follows that the contract between the owner and the contractor is subject to the general law of contracts both as to its validity and its enforcement.

Sections 1183 and 1184, in no respect, modify or qualify the rule that the contractor must perform his part of the contract before he can recover from the owner. On the contrary, it is clear that the statute is based upon the theory that the contractor must perform his part of the contract before he becomes entitled to a lien. In other words there must be a common-law liability, a debt due and owing, the contract price due and payable, from the owner to the contractor, to entitle the contractor to a lien for his work and materials. (*Marchant v. Hayes*, *supra*; see *Turner v. Strenzel*, 70 Cal. 28, 11 P. 389; *Dennison v. Burrell*, 119 Cal. 180,

51 P. 1; *Wiggins v. Bridge*, 70 Cal. 437, 11 P. 754; *Cox v. Railroad*, *supra*; *Harmon v. Ashmead*, 60 Cal. 349.)

Destruction of the building by fire before completion, therefore, deprives the contractor of his right to a lien. (*Clark v. Collier*, 100 Cal. 256, 34 P. 677; *S. M. Perry L. Co. v. Jones*, Superior Court L. A. Co. Judge Shaw, 1893.)

The original contract may be modified by an executed oral agreement, and when the contract is substantially completed according to its changed terms, the right to a lien is not thereby lost by failure to complete the structure according to the terms of the original contract. (*Anderson v. Johnston*, 120 Cal. 657, 653 P. 264.)

The same. Abandonment.

Sec. 73. The right of the original contractor to a lien for his work and materials depends upon his substantial performance of his contract. (*Griffith v. Happersberger*, 86 Cal. 605, 613, 25 P. 137, 487; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 P. 686; *Anderson v. Johnston*, 120 Cal. 657, 53 P. 264.)

Where, therefore, the contractor voluntarily abandons his contract, he is not entitled to a lien, nor by the general law of contracts, can he recover upon the contract at all.

(As to right to lien: *Dingley v. Green*, 54 Cal. 333; *Turner v. Strenzel*, 70 Cal. 28, 11 P. 389; Sec. 1200 C. C. P.; secs. 202, 303, 307, *infra*. Recovery upon contract: *Blythe v. Poultney*, 31 Cal. 234; *Marchant v. Hayes*, 117 Cal. 669, 49 P. 840; see sec. 363, *infra*.)

The same. Prevention of performance of contract by owner.

Sec. 74. Performance of the contract by the contractor is excused in certain cases and among these excuses is that of prevention of performance by the owner. (C. C. sec. 1511.)

No reason is perceived why the contractor is not entitled to a lien for the amount due him upon the contract if he is prevented by the owner from completing his contract. There is nothing in the lien law which denies this right to the contractor and to permit the owner to prevent the completion of the building, or the performance of the contract, and to retain the materials furnished and receive the benefit of the labor performed without making his property subject to liens therefor would hold out such strong inducements for sharp practices that few contracts would ever be fully performed. (See sec. 199 *et seq* ; sec. 361 *et seq* , *infra*.)

The non-payment of an installment of the contract price when due, does not amount to prevention. (*Cox v. Railroad*, 44 Cal. 18; secs. 212, 362, 363, *infra*.)

But it is a breach of the contract and justifies the contractor in leaving the work. (See secs. 202, 363, *infra*.)

Original contractor not entitled to lien unless contract price is due to him.

Sec. 75. Section 1183 among other things, provides that the contract between the reputed owner and the contractor shall operate as a lien in favor of all persons, except the contractor, to the extent of the contract price; and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor.

Section 1193 also provides that "the contractor shall be entitled to recover upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished as aforesaid."

Under these sections, therefore, where there is nothing due to the contractor on the contract price, he is not entitled to a lien. (*Harmon v. Ashmead*, 60 Cal. 439.)

In *Dore v. Sellers*, 37 Cal. 588, the provisions of the lien act of 1862 from which that portion of section 1183 above

mentioned was copied, was under consideration and it was there held that if a contractor engages to construct a building in consideration—in whole or in part—of a debt then owing from him to the employer, or of a sum of money paid him by the employer upon the execution of the contract, that portion of the contract price represented by the debt or the advance payment, can not become a lien upon the building. But see as to contract price payable in land, *Baird v. Peall*, 92 Cal. 235, 28 P. 285. See also sec. 178 *infra* which states the rule under the present statute.

Subcontractors, laborers and materialmen. Division of subject.

Sec. 76. As we have shown in preceding sections, the contractor is given a lien only when his contract is valid within section 1183 and meets the requirements of section 1184. But subcontractors, (*Macomber v. Bigelow* 58 P. 312) laborers and materialmen and the other persons mentioned in section 1183 are given liens for their labor and materials when the original contract is valid as well as when it is void under section 1183 or in violation of the provisions of section 1184.

If the original contract is valid, the statute provides that it shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price, and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor, and if the original contract is void under section 1183 or does not conform to section 1184, then, that the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner and such persons shall have a lien for the value of their work and materials. (See *Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860.)

But the right of all persons, except the contractor, to liens, does not depend upon the existence of a valid original contract. Under the statute the owner has the right to erect his own buildings and to employ laborers and contract directly with materialmen for that purpose. In such case, the laborers employed by the owner and the materialmen who furnish material to him are entitled to liens.

The statute does not prohibit the owner from erecting his own buildings. He is free to erect them by any method he pleases, and it is only when he does erect them through the instrumentality of an original contractor, that the special provisions of the statute are made applicable.

The right of laborers and materialmen to liens, may, therefore, be considered from three standpoints, namely:

1. When there is a valid original contract;
2. When the original contract is void under section 1183, or does not conform to section 1184; and,
3. When the owner erects his own buildings and employs laborers and contracts directly with materialmen for that purpose without the intervention of an original contractor.

Laborers and materialmen. Valid original contract.

Sec. 77. Where there is a valid original contract it operates as a lien in favor of all persons, except the contractor, to the extent of the whole contract price, etc. (Sec. 1183, C. C. P.) The contract price, therefore, is made the test of the right to, and the limit of, liens of all persons. It follows that if the contract price has been paid in full and in accordance with the terms of the contract, at the time the claim of lien is filed for record, there can be no lien in favor of the original contractor, or of materialmen and laborers; for, if there is no existing lien on the original contract, none exists on the subsidiary contract. (*Dingley v. Green*, 54 Cal. 33; *Rosekranz v. Wagner*, 62 Cal. 151; *O'Donnel v.*

Kremer, 65 Cal. 353, 4 P. 204; Bowen v. Aubrey, 22 Cal. 566; Blythe v. Poultney, 31 Cal. 234, and cases *infra* in this section.)

Again, the rights of subcontractors, laborers and materialmen to liens must be determined and controlled by the terms of the original contract. Such persons are presumed to have notice of the existence and of the terms of such contract, and of the rights and obligations of the parties thereto, and to have contributed labor and furnished materials in strict subordination to such terms and obligations. (Shaver v. Murdock, 36 Cal. 293; Henley v. Wadsworth, 38 Cal. 356; Hooper v. Flood, 54 Cal. 218; Dingley v. Green, *supra*)

But this rule does not apply to void contracts. (Kellogg v. Howes, 81 Cal. 170, 179, 22 P. 509; Butterworth v. Levy, 104 Cal. 506, 38 P. 897, and see as to waiver, etc., sec. 180 *et seq.*, *infra*.)

And where the original contract is entire, laborers and others are not entitled to liens unless the contract has been substantially performed. (Cox v. Railroad, 44 Cal. 18; Meigs v. Bruntsch, 54 Cal. 601.)

In Dore v. Sellers, 27 Cal. 588, the rule was laid down that if the contractor has paid the subcontractor according to the terms of his contract with him, and has not made premature payments, the employees of the subcontractor are not entitled to liens or to demand anything from the contractor or owner.

In Renton v. Conley, 49 Cal. 185, the court had under consideration the lien act of 1867-8 (stat. p. 589), and it was there held that if the owner of a building makes payments to the contractor in good faith, under and in pursuance of the contract, before receiving notice, either actual or constructive, of liens claimed by a materialman or laborer, for material furnished to, or labor done for, the contractor, such materialman or laborer cannot enforce a lien on the building for a sum exceeding the balance due on the contract price when the notice was given.

In *Wells v. Cahn*, 51 Cal. 423, the same rule was laid down, and it was there said that the amendments to the Code of Civil Procedure (secs. 1183 and 1192, adopted in 1874) have not changed that rule.

Again, in *Dingley v. Green*, 54 Cal. 333, it was decided that if the original contractor fails to perform his contract, or if he has performed it in part, and there is no money due to him according to its terms—or if, having performed it, he has been fully paid by the owner of the property, according to the terms of the contract, before notice of liens—the contractor's employees are not entitled to enforce a lien upon the property. (*Gibson v. Wheeler*, 110 Cal. 243, 42 P. 810; *Dennison v. Burrell*, 119 Cal. 180, 51 P. 1; *Whittier v. Hollister*, 64 Cal. 283, 30 P. 846; *Turner v. Strenzel*, 70 Cal. 28, 11 P. 389; *O'Donnel v. Kremer*, 65 Cal. 353, 4 P. 204; *Latson v. Nelson*, 11 P. C. L. J. 589; see secs. 304, 305.)

Section 1200 of the C. C. P. has modified, in some respects, the rules laid down by the earlier decisions. Under this section subcontractors, laborers and materialmen are entitled to liens where the contractor fails to perform "in full," or abandons his contract, though, according to the terms of the contract, nothing is due to the contractor thereon. (See sec. 307 *et seq.* for statute and comments.)

But if, by the terms of the original contract, a portion of the contract price is not due until after the building is completed, and the owner with notice that a materialman has furnished materials, pays his contractor before the building is completed, and before the same is due, he is held to the materialman to the extent of the money thus prematurely paid. (*Walsh v. McMenomy*, 74 Cal. 356, 16 P. 17; *Sweeney v. Meyer*, 124 Cal. 512, 57 P. 479; sec. 1184, C. C. P.)

Laborers and materialmen must, however, perform their contracts before they are entitled to liens. If, therefore, the contract of a materialman with the contractor is entire, he must perform it fully before he is entitled to a lien. (*First Natl. Bank v. Perris et c.* I. Dist., 107 Cal. 55, 40 P. 45; *Harmon v. Ashmead*, 60 Cal. 439.)

The same. Contract price less than one thousand dollars.

Sec. 78. If the price of the original contract does not exceed one thousand dollars, laborers and materialmen, notwithstanding this fact, are entitled to liens for their labor and materials. Such contracts, as well as those whose price exceeds one thousand dollars, operate as liens in favor of all persons. (Sec. 1183.)

A laborer is, therefore, entitled to enforce a lien for his work done for the contractor, although the price of the original contract is less than one thousand dollars, where the price has not been paid at the time when the claim of lien is filed and the action commenced. (*Schmid v. Busch*, 97 Cal. 184, 31 P. 893.)

An original contract for less than one thousand dollars is valid notwithstanding it does not conform to the provisions of section 1184 of the C. C. P. relative to the mode and time of payment and for withholding a certain percentage of the contract price for the benefit of lien-holders; but under such contracts mechanics and materialmen cannot claim liens for a greater amount than the sum due and unpaid to the contractor; and if nothing was due the contractor at the time of his abandonment of the contract and he was to be paid by the terms of the contract only upon completion of the building, liens cannot be claimed for a proportional part of the contract price earned at the date of abandonment by the contractor, and if the building is completed by the owner of the building substantially as called for by the contract, the amount available for the liens of those who have furnished labor and materials to the contractor would be only the excess of the contract price remaining in the owner's hands after payment of the cost of completion. (*Dennison v. Burrell*, 119 Cal. 180, 51 P. 1.; see, 311, *infra*.)

The same. Contract price payable otherwise than in money.

Sec. 79. Section 1184 provides, *inter alia*, that "as to all liens, except that of the contractor, the whole contract price shall be payable in money."

In *Schmid v. Busch*, 97 Cal. 184, 31 P. 893, the contract price was less than one thousand dollars and was made payable in land which the owner agreed to convey to the contractor upon a certain condition which had not been performed by the contractor at the time the claim of lien of the plaintiff was filed and the action commenced. A laborer who performed work upon the building for the contractor filed his lien and commenced his action to enforce the same and alleged that at the time of filing his claim, the land had not been conveyed and that the value of the work done and materials furnished by the contractor was about four hundred dollars and more than sufficient to pay the claim of the laborer and that the whole sum was owing from the owner to the contractor, and it was held that the laborer was entitled to a lien for his work under sections 1183, 1184 and 1201, and to enforce it, although the contract price was less than one thousand dollars and payable in something other than money, since it appeared that the contract price had not been paid when the claim of lien was filed for record and the action commenced.

The same. Abandonment by original contractor.

Sec. 80. Section 1200 has changed the rule laid down by the earlier decisions that if, upon abandonment of the contract by the original contractor, there is nothing due thereon to him according to its terms, his laborers and materialmen are not entitled to liens. This section is presented in chapter X, section 307, *et seq., infra*. The decisions referred to, however, are here given because they show the former rule and its application and also because they es-

tablish some rules not properly falling within section 1200 and which have not, therefore, been changed by that section.

A materialman who has furnished materials to the original contractor to be used by him in the construction of a building for the contracting-owner, is not entitled to a lien upon the property, if the contractor has abandoned his contract and there is nothing due him from the owner according to the terms of the contract, (*Turner v. Strenzel*, 70 Cal. 28, 11 P. 389; *Blythe v. Poultney*, 31 Cal. 234; *Johnson v. LaGrave*, 102 Cal. 324, 36 P. 651,) and the fact that the owner at the time of the abandonment of the work had paid the latter in excess of the payments called for by the contract, does not entitle subcontractors to liens for such excess. (*Henley v. Wadsworth*, 38 Cal. 356.)

In *Dingley v. Green*, 54 Cal. 333, the court, page 336, say:

"If there is no existing lien on the original contract, none exists on the subsidiary contract. The liens to secure the latter are wholly dependent on that of the former. The contracts of materialmen and workmen with the original contractor are made with reference to his contract with the owner and in subordination to its terms. (*Henley v. Wadsworth*, 38 Cal. 356.) When, therefore, the original contractor in this case abandoned his contract, after partial performance, there was nothing upon which the liens of plaintiff (laborers and materialmen) could attach, unless there was something due by the owner upon the contract for the work which the contractor had done * * * *

(page 337). As, therefore, the owner had strictly complied with her contract, and there was nothing due upon it from her to the contractor for the work which had been performed by him when he abandoned it, his employes have no liens under the law which can attach to the buildings after they were completed by other contractors, unless the buildings were completed by the creditors of McMeckan (contractor) in the performance of McMeckan's contract, or by the owner for their benefit." (See *Dennison v. Burrell*, 119 Cal. 150, 51 P. 1.)

In *Wiggins v. Bridge*, 70 Cal. 437, 11 P. 754, a contractor for the erection of a building abandoned the work before the completion of the building, after being paid in full by the owner for the work already done, and it was held that a materialman was not entitled to a lien upon the building for the materials furnished to the contractor for its construction, unless the owner afterward completed it at a less amount than the balance of the contract price. (See *Blythe v. Poultney*, 31 Cal. 233, 239, *supra*; sec. 202 and sec. 270, *infra*. As to abandonment and amount of price applicable to lien, see statute and comments thereon, sec. 307, *et seq.*, *infra*.)

The same. Original contract void.

Sec. 81. The statute provides that where the original contract is void under sections 1183 and 1202, or does not conform substantially to the provisions of section 1184, "the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner and they [all persons except the contractor,] shall have a lien for the value thereof."

In these cases, the right of all persons, except the contractor, to liens, is absolute. The right to the lien does not depend upon the existence of an unpaid balance of the contract price, and it is limited only by the value of the work done and materials furnished. (*Macomber v. Bigelow*, 58, P. 312.)

In *Kellogg v. Howes*, 81 Cal. 170, 22 P. 509, it was held, in construing the provisions of the above sections, that if the original contract, the price of which exceeded one thousand dollars, was not filed for record as required by section 1183 of the C. C. P., it was wholly void for all purposes and that subcontractors, laborers and materialmen, though having actual knowledge of the void contract, could enforce their liens against the property of the owner for the value of their

work done and materials furnished without reference to the amount remaining unpaid to the original contractor by the owner and without giving personal notice to the owner to withhold payments due the contractor as provided in section 1184.

And it was further held that if such contract was not filed as required by section 1183, the *statute* and not the *contract*, measured the extent of the owner's liability to lienholders because, in such case, there was no contract—the contract, as the statute provides, being “wholly void.”

Again in *Davies-Henderson L. Co. v. Gottschalk*, 81 Cal. 611, 22 P. 860, the original contract under the same circumstances, was held “wholly void,” and that the persons furnishing materials to the subcontractor could claim liens for the value thereof, and as if the materials had been furnished at the special instance of the owner.

The rule laid down in the above cases is the settled law of this state. (*Dunlop v. Kennedy*, 102 Cal. 443, 36 P. 765; *San Francisco L. Co. v. O'Neil*, 120 Cal. 455, 52 P. 728; *Giant Powder Co. v. Flume Co.*, 97 Cal. 263, 32 P. 172; *Spinney v. Griffith*, 98 Cal. 149, 32 P. 974; *Macomber v. Bigelow*, 123 Cal. 532, 56 P. 449; *McMenomy v. White*, 115 Cal. 339, 47 P. 109; *Pierce v. Birkholm*, 115 Cal. 657, 47 P. 681; *Kuhlman v. Burns*, 117 Cal. 469, 49 P. 585; secs. 137, 302, *infra*.)

In *Davies-Henderson L. Co. v. Gottschalk*, *supra*, the original contract was void because not filed for record (the price thereof exceeding one thousand dollars) and it was contended that the materialman was not entitled to a lien on the ground that there was no personal liability on the part of the owner to him (the material having been furnished to the contractor), but it was held that he was entitled to a lien for the material furnished and actually used in the construction of the building; that there need be no personal liability on the part of the owner, and that the statute gave the lien upon the property of the owner for the material the owner has actually used in his building.

As was said in *Giant Powder Co. v. Flume Co. supra*, where an attempted contract was void for non-filing, "in such case" (quoting section 1183) "the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

The same rule applies to a contract made in violation of section 1184 of the C. C. P. (*San Diego L. Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431; *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; see secs. 302 and 193, *infra*.)

Materialmen in the second degree.

Sec. 82. Section 1183 expressly states the materials for which it gives liens. It provides that the persons named in it "furnishing materials to be used in the construction * * * of any building * * * shall have a lien upon the property * * *" for which they have furnished materials, for the value thereof, whether at the instance of the owner or of any other person acting by his authority, or under him, as contractor or otherwise, and "every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction * * * of any building * * * shall be held to be the agent of the owner for the purposes of this chapter."

From this language it will be observed that the materialman who would claim a lien for his materials, must bring himself into contractual relations with the contractor, subcontractor, architect, builder, or of some other person having charge of any mining, or of the construction, etc., of the building, etc.

A materialman is not a person who has charge of the construction, etc., of any building, etc. Nor is he named as one of the authorized agents of the owner. He is a mere furnisher of materials. It follows therefore, that a lumber-merchant who furnishes materials to a materialman is not

entitled to a lien therefor. (*Roebblings Sons Co. v. Humboldt Co.* 112 Cal. 288, 44 P. 568; *Wilson v. Hind*, 113 Cal. 357, 45 P. 695; *Avery v. Clark*, 87 Cal. 619, 629, 25 P. 919; *Sparks v. Mining Co.*, 55 Cal. 389, 392.)

Where owner contracts directly with laborers and materialmen.

Sec. 83. Section 1183 provides, *inter alia*, that specially designated classes of persons and "all persons performing labor upon or furnishing materials to be used in the construction" etc., of any building, etc., "shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished whether at the instance of the owner or of any other person acting by his authority, or under him as contractor or otherwise," etc.

The only limitation upon the right of the persons named in the statute to liens, are those found in sections 1183 and 1184 and made applicable to contracts the price of which exceeds one thousand dollars, that is original contracts, and the further qualification that the labor must have been performed upon and the materials furnished to be used and used in the construction of the building, etc., upon which the lien is claimed.

In considering the right of laborers and materialmen who contract directly with the owner, it is necessary to determine first whether they are original contractors within the meaning of sections 1183 and 1184 and are thus brought within the limitations found in those sections.

This question has been treated in a preceding chapter (chap. III, secs. 47-61), and it is sufficient to say here that a *mere* materialman is not, under any circumstances, an original contractor.

On the other hand, neither is the contract for individual labor of a laborer an original contract, or the laborer an original contractor within the meaning of sections 1183 and 1184. (Sec. 63, *supra*.)

Section 1183 gives liens to laborers and materialmen and the other persons therein named when their work is done and their materials are furnished at the "instance" of the owner. It recognizes a direct contract between the owner who constructs his own buildings and laborers and materialmen, as the foundation for their right to liens and they are entitled to such liens for the value of their work done and materials furnished, or if the price of their contracts is fixed, then to the extent of the contract price due thereunder from the owner. (*Barber v. Reynolds*, 44 Cal. 519.)

CHAPTER V.

WORK AND MATERIALS LIENABLE.

Section.		Section.	
84	THE STATUTE. SECTION 1183.	90	The same. Powder; cartage; painting; patterns, etc.
85	Comments on section 1183.	91	Materials must by express terms of contract be furnished to be used and used in the building, etc., upon which lien is claimed.
86	FOR WORK WHICH LIEN MAY BE CLAIMED.	91a	The same. Meaning of "express terms of contract."
87	The same.		
88	Work not limited to construction, alteration, addition or repair.		
89	MATERIALS LIENABLE.		

The statute.

Sec. 84. Section 1183 of the C.C.P., provides; *inter alia*, that the persons therein named, "performing labor upon or furnishing materials to be used in the construction, alteration, [87] addition to [87], or repair, [85] either in whole or in part [85] of any [a] building, wharf, bridge, ditch, flume, aqueduct, [99] well [99], tunnel, fence, machinery, railroad, wagon road, or other structure, shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials furnished," etc.

Another provision of the same section is: "And any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished by each respectively," etc.

By the amendment of 1885 to section 1183 the words "mining claims" were stricken out at a point indicated by "[a]" and the clause concerning mining claims above quoted added.

See chap. I, sec. 1, for this section in full, amendments thereto, notes thereon and explanation of figures and brackets.

Comments on section 1183.

Sec. 85. We have shown in a preceding chapter (chap. II, sec. 24) that the mechanic's lien, so-called, was unknown at common law and had no existence under the Mexican law. The lien, therefore, is a statutory creation, and the right of any person to claim a lien for his work and materials, or for either of them, upon any building or other structure or improvement, must be sought for in the statute itself. (*Spinney v. Griffith*, 98 Cal. 149, 32 P. 974; *Davis v. McDonough*, 109 Cal. 574, 42 P. 450.)

The statute (sec. 1183) enumerates certain classes of persons who may claim liens for their work or materials, or for both, but the person who, by virtue of this statute, would establish his right to a lien thereunder, must bring himself, not only within one of the classes of persons enumerated, but he must also have shown compliance with the conditions precedent to his right to a lien imposed by the statute—he must have performed labor upon, or furnished materials to be used and the materials must have been used in the construction, alteration, addition to, or repair, either in whole or in part, of some one of the buildings, or other structures or improvements mentioned in the statute. (*El-lison v. Jackson W. Co.*, 12 Cal. 555; *Burt v. Washington*, 3 Cal. 246.)

This brings up the consideration of the work and materials for which liens may be claimed.

Work for which lien may be claimed.

Sec. 86. As we have stated, the statute provides that the labor for which a lien may be claimed must have been performed *upon* the particular building, or other structure or improvement upon which the lien is claimed and such building, or other structure or improvement must be one of those mentioned in the statute.

In *McCormick v. Los Angeles W. Co.*, 40 Cal. 185, it was held that a cook was not entitled to a lien for his labor in cooking for men engaged in excavating a reservoir notwithstanding the cooking was done on the ground as the work progressed.

The court, page 187 say:

"If the plaintiff (cook) can assert a lien on the facts proved, he could as well have done so if the cooking had been performed at any other place; and if the mere fact that a person is employed to cook for the laborers engaged in erecting a building entitled him to a lien, the same result would follow if he had furnished the provisions also.

"On the same theory a blacksmith who shod the horses, or a grain dealer who furnished them forage whilst employed on the work, or a wagon maker who repaired the carts of the contractor, would be entitled to a lien upon the building. And if everyone who contributed indirectly and remotely to the work is entitled to a lien, no reason is perceived why a surgeon called to set a broken limb of one of the laborers, whereby he will be enabled at an early day to resume work on the building, might not assert a lien."

In *Adams v. Burbank*, 103 Cal. 646, 37 P. 640, Tucker, one of the plaintiffs, filed a lien upon the property in question, for hauling brick for a materialman which were used in the building. It was objected that he was not entitled to a lien. The court, at page 651, say:

"It is not perceived that Tucker was entitled to a lien. He did not perform labor upon the building or furnish materials therefor, but was employ-

ed by the brick-men to haul brick for them and had no connection with the contractor, who owed him no liability. His position is not different from that of the laborers who made the brick."

In *Wilson v. Nugent*, 125 Cal. 280, 57 P. 1008, the services for which a lien was claimed consisted of hauling slate to the building and delivering it to the contractor. This the court said, did not bring the lien-claimant within the terms of the statute as he had not performed labor *upon* the building.

Work for which lien may be claimed, continued.

Sec. 87. The above cases must be distinguished from those where the hauling or cartage is properly chargeable as a part of the value or price of the materials furnished. In *Adams v. Burbauk*, *supra*, Tucker was not a materialman. Under contract with the materialman, Tucker hauled lumber for the materialman and he (Tucker) sought to enforce a lien for the hauling against the property of the owner.

This distinction is pointed out in *West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 P. 231, where it was held that a materialman who had included in his claim of lien for materials, the cost of cartage of the materials, was entitled to enforce his lien for both the materials and the cartage since the latter was properly allowable as part of the value of the materials furnished.

In *Malone v. Big Flat G. M. Co.*, 76 Cal. 578, 585, 18 P. 772 Heath, a blacksmith, performed labor, in the blacksmith-shop which was upon the mining claim, which labor consisted of sharpening picks and drills, making pipe and and doing other necessary work. He filed his claim of lien for his work against the mining claim and the point was made that the labor performed was not labor upon the mining claim within the purview of the statute. But the court in overruling this point say that the tools and machinery

upon which Heath performed his labor were used in working and developing the mine and were deemed affixed to the mine by virtue of section 661 of the Civil Code and that, therefore, the work done upon the tools and machinery, while they were so used, was work upon the mine.

Work performed upon "property" in sinking a well prior to the amendment of 1899 adding the word "well" to section 1187, was lienable under the provisions of the lien law and the constitution. (*Bramlette v. Laswell*, Superior Court of L. A. Co., 1898, Judge Van Dyke.)

Persons employed in sinking a shaft on a quartz mining claim are each entitled to a lien upon the mining claim for the labor so performed. (*Hines v. Miller*, 122 Cal. 517, 55 P. 401.)

But work performed in "drifting a tunnel" is not the construction, alteration, or repair of any building or improvement on a mine, with the meaning of section 1192. (*Jurgenson v. Diller*, 114 Cal. 491, 46 P. 610.)

Work not limited to "construction, alteration, addition to, or repair."

Sec. 88. Section 1183 provides that the persons named in it, "performing labor *upon* or furnishing materials to be used in the construction, alteration, addition to, or repair of any building," etc., shall have a lien.

In *Palmer v. Lavigne*, 104 Cal. 30, 37 P. 775, the question arose whether a contractor performing labor upon a house in moving it from one place to another, was entitled to a lien for such work.

The court, at page 31, quote the above provision of the statute, and say:

"Manifestly the preposition *upon* refers to and has for its objective the noun 'building,' and is to be read as though the word 'building' with its qualifying word *any* followed immediately after the word *upon*. The lien to materialmen is only

given to those who furnish materials to be used in the *construction, alteration, addition to, or repair* of the building, etc.; that to laborers is given to all who perform labor upon it, whether technically coming within the definition of construction, alteration, etc., or not." (To the same point *Donahue v. Cromartie*, 21 Cal. 80.)

Materials Liable.

Sec. 89. The language of section 1183 is that material men furnishing materials to be used in the construction, alteration, addition to, or repair of any building, etc., shall have a lien upon the property for which they have furnished materials for the value of such materials furnished, etc.

It will be observed that this language limits the uses of the materials for which a lien is given, to the "construction, alteration, addition to, or repair, either in whole or in part, of any building," etc. A lien cannot, therefore, be claimed for materials which are not furnished to be used and used in the "construction, alteration, addition to, or repair," of a building or other structure or improvement named in the statute. It was so held in *Palmer v. Lavigne*, 104 Cal. 30, 37 P. 775, where a contractor sought to enforce a lien for materials furnished to be used and which were used in "moving" a house from one place to another.

Section one of the lien act of 1856 (stat. 1856, 203) provided that all artisans, etc., performing labor or furnishing materials for the construction or repairing of any building, wharf or other superstructure, should have a lien, etc.

In *Selden v. Meeks*, 17 Cal. 129, the question arose whether the language of this statute was sufficiently broad to include the sale of a building already constructed.

In this case the building was sold to constitute part of a larger structure the erection of which was provided for by the original contract, and the building sold was used in accordance with the provisions of the original contract. It

was held that the building was properly regarded as materials sold. But the court laid down the general rule that the sale of a building already constructed did not come within the provisions of that statute.

The materials for which a materialman may claim a lien are those only which he has furnished himself. He cannot enforce a lien for materials furnished by third parties. The materialman may, however, include in his claim of lien for materials, all materials which come within the scope of his contract. Accordingly materials furnished by a third party to be used in the construction of a building may be included in the claim of lien of the materialman for materials where the latter has been compelled to pay for the same in cash as a condition of their delivery and where the contract of the claimant covers the materials furnished by the third party. (Avery Clark, 87 Cal. 519, 25 P. 919.)

The same. Powder; cartage; painting; patterns, etc.

Sec. 90. In *Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 P. 419, a claim of lien for powder furnished and used in the construction of defendant's flume, was sustained though the question does not seem to have been mentioned in the opinion of the court in that case. In a subsequent report of the same case (88 Cal. 20, 25 P. 976), Justice McFarland concurs in the judgment there rendered by the court but dissents from the rule which seems to have been laid down in the former decision to the effect that there may be a lien for powder exploded in blasting for the foundation of a house or of a flume. In a concurring opinion in the same case, Justice DeHaven concurs in the opinion of the court and says the question of whether powder exploded in the work of constructing a flume or tunnel may be regarded as a part of the materials used in the construction, is not involved in the disposition of the case. (See *California Powder Works v. Blue Tent etc. Co.*, 22 P. 391, where a lien for explosives was upheld.)

Cartage is properly chargeable as a part of the cost of materials furnished. (*West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 P. 231.)

Painting and varnishing (*Harlan v. Stufflebeem*, 87 Cal. 508, 25 P. 686), and papering or decorating a house with paper decorations, are proper subject-matters of mechanic's liens. (*La Grill v. Mallard*, 90 Cal. 373, 27 P. 294.)

In the last case, the court, at page 376, say:

"The paper loses its character of personalty, becomes affixed to the building, and its removal therefrom results in a destruction of its value."

The value of patterns used in the manufacture of couplings by a materialman and the value of the boxes in which the couplings were cased for shipment to the contractor, cannot be included as separate charges from the price of the couplings, where both the patterns and boxes remained the property of the materialman, and were not incorporated in the structure, and such charges are too remote from the actual work of construction to permit their cost to be made a charge against the contract price in the hands of the owner of the structure. (*First Nat. Bank v. Perris I. D. Co.*, 107 Cal. 55, 40 P. 45.)

The court, at page 66, say:

" * * * Both the patterns and the boxes were made the subject of separate charges by the intervenor and not included in the price of the couplings; they remained the property of the contractor and were not incorporated in the structure; in these respects, and perhaps others, differing from the cartage considered lienable in *West Coast L. Co. v. Newkirk*, (*supra*), as being included in the value of the materials furnished."

The charge for barrels in which cement is delivered is properly included in the claim of lien. The rule as laid down in *Snell v. Payne*, 115 Cal. 218, 46 P. 1069, is that where material is usually delivered in packages, it is proper to charge for it as packed although the material constituting the package does not literally go into the construction of the building.

Materials must, by the express terms of the contract, be furnished to be used and used in the building, etc., upon which the lien is claimed.

Sec. 91. The material must not only be of a lienable character, but it must also have been furnished to be used and actually used in the building, or other structure or improvement against which the lien is sought to be enforced.

The language of section 1183 is, that the materialman furnishing materials *to be used* in the construction, etc., of any building, etc., shall have a lien upon the property for which he has furnished materials for the value of the materials furnished.

To meet the requirements of the statute, therefore, three things are necessary.

1. The materials must have been furnished to be used in the particular building, etc., upon which the lien is claimed.

2. Such materials must have been actually used in the particular building, etc., and these two imply a third—

3. That such materials must have been so furnished to be used in a particular building, etc., pursuant to the terms of a contract therefor. (See sec. 91a, *infra*.)

In *Bottomly v. Grace Church*, 2 Cal. 90, the claim of lien of a lumberman was held invalid because it was neither averred nor proved that the lumber was expressly furnished for the building in question. The court held that it was not sufficient to show that the lumber was used in the building. At page 92 it is said:

“The statute never contemplated that a lumber merchant should have the right of following the materials which he had sold to another, in general terms, and obtaining a lien upon any building to which the materials had been applied * * *. The materials must not only have been used in the construction of the building, but they must, by the express terms of the contract, have been furnished for the particular building on which the lien is claimed.” (See to the same point, *Houghton v. Blake*, 5 Cal. 240.)

In *Holmes v. Richet*, 56 Cal. 307, the court, at page 311, say:

"The language of the code is, that a party furnishing materials to be used in the construction of a building shall have a lien. If they were furnished to be used in the construction of a ship, but were, in fact, used in the construction of a house, the materialman would not, in consequence of the fact that they were so used, have a lien upon a house. In the one case, the law would consider the materials furnished under and in pursuance of the provisions of the code, and with a view to give a lien; but in the other not." (Settles query raised in *Barrows v. Knight*, 55 Cal. 155; see *Silvester v. Coe etc., Co.*, 80 Cal. 510, 22 P. 217.)

In *Cohn v. Wright*, 89 Cal. 86, 88, 26 P. 643, the court say:

"There is no allegation in the complaint that the materials were furnished for or to be used upon the property sought to be charged with the lien. It is not enough to allege that the materials were furnished by plaintiff and actually used by defendants in the construction of the building." (See *Lumber Co. v. Neal*, 90 Cal. 213, 27 P. 192; *Roebeling Sons Co. v. Bear Valley etc., Co.*, 99 Cal. 488, 34 P. 80.)

The same. Meaning of "express terms of contract."

Sec. 91a. The rule laid down that the materials, to be lienable, must be furnished pursuant to the *express* terms of the contract, is in accordance with the language used in *Bottomly v. Grace Church*, *supra*, and of that reiterated in subsequent decisions (sec. 91, *supra*), but it is clear that these decisions mean nothing more than that the materials must be furnished for *some particular building* or other improvement, and that the lien may be claimed for such materials upon the particular building or other improvement only, for which, by the contract they were furnished.

The fact, that, by the terms of the contract, the materials were furnished for a particular building or other improvement, would, therefore, be a mere matter of proof of the terms of the contract, and, in the absence of "express" terms of the contract, the acts of the parties, or any other fact showing that the materials were sold for a particular building or other improvement, would be sufficient to meet the requirements of the statute in this respect. In *Dona-hue v. Cromartie*, 21 Cal. 81, it was held that under a written contract for materials, parol evidence was admissible to show that such materials were furnished to be used in the building upon which the lien was claimed.

CHAPTER VI.

PROPERTY SUBJECT TO LIEN.

Section.

- 92 THE STATUTE. "Property" subject to lien. Section 1183.
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- 94 THE STATUTE. Land or estate therein of non-contracting owner. Section 1192.
- 95 Comments on statutes. Division of subject.
- 96 "PROPERTY" SUBJECT TO LIEN.
- 97 Personal property.
- 98 The Same. Rule laid down.
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- 101 Mines, tools and machinery.
- 101a Part of building or structure.
- 102 LAND OR ESTATE THEREIN OF CONTRACTING-OWNER.
- 103 Equitable estates.
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- 105 LAND OR ESTATE THEREIN OF NON-CONTRACTING OWNER.
- 106 Mortgagee not "owner" within section 1192.
- 107 Trust deed. Grantee is "owner" within section 1192.
- 108 Lessor is "owner" within section 1192.
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Section.

- 110 Work etc., under section 1191 not within section 1192.
- 111 Work etc., on mining claim, when within section 1192.
- 112 Scope of section 1192.
- 113 Knowledge by non-contracting owner of construction of building, etc. Notice.
- 114 The same. The decisions.
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- 116 The same. Knowledge, etc., by non-contracting owner of intended construction, etc.
- 117 Notice of non-responsibility. The statute. Comments on.
- 118 The same. Statutory requirements of notice.
- 119 The same. Time of posting notice.
- 120 The same. Manner of posting notice.
- 121 The same. Effect of failure to give notice.
- 122 PARTICULAR PROPERTY SUBJECT TO LIEN. Homestead.
- 123 Property of public corporations.
- 124 Mining claims. What is a mining claim within the meaning of the lien law.
- 125 The same.
- 126 AREA OF LAND SUBJECT TO LIEN. The statute.
- 127 What is convenient space of, about the building, etc.
- 128 The same. Mining claims.

Property subject to Lien. Section 1183.

Sec. 92. Section 1183 of the C. C. P. provides, *inter alia*, that the persons therein named, "performing labor upon or furnishing materials to be used in the construction, alteration, [87] addition to [87], or repair, [85] either in whole or in part [85] of any

- 1 Building,
- 2 Wharf,
- 3 Bridge,
- 4 Ditch,
- 5 Flume,
- 6 Aqueduct,
- 7 [99] Well [99],
- 8 Tunnel,
- 9 Fence,
- 10 Machinery,
- 11 Railroad,
- 12 Wagon road, or other

13 Structure, shall have a lien upon the property upon which they have bestowed labor, or furnished materials, for the value of such labor done and materials, furnished," etc., "and any person who performs labor in any mining claim or claims, has a lien upon the same and the works owned and used by the owners for reducing the ores from such mining claim or claims," etc.

(See sec. 1, *supra*, for section 1183 in full, amendments thereto, notes thereon, and explanation of brackets and figures.)

Land or estate therein of contracting-owner subject to lien. Section 1185.

Sec. 93. Section 1185 of the C. C. P. provides:

"The land upon which any building, improvement [99] well [99], or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof,

[73-4] to be determined by the court on rendering judgment [73-4], is also subject to the lien, if [a, 73-4] at the commencement of the work, or of the furnishing of the materials for the same [73-4], the land belonged to the person who caused said building, improvement, [99] well [99], or structure to be constructed, altered, or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

(See note to preceding section and also sec. 3, *supra*.)

**Land or estate therein of non-contracting owner
subject to lien.**

Sec. 94. Section 1192 of the C. C. P. is as follows:

"Every building or other improvement mentioned in section 1183 of this code, constructed upon any lands with the knowledge of the owner, or the persons having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon." (For notes on this section, see sec. 10, *supra*.)

Section 1191 of the C. C. P. also gives a lien to any person who at the request of the reputed owner of any lot, etc., improves, etc., the same. The word "lot" as used in this section means whatever territory the owner causes to be improved under a single contract, whether composed of one or any number of subdivisions such as in ordinary speech are termed "lots." (Warren v. Hopkins, 110 Cal. 506, 42 P. 986.)

Section 1191 applies to grading or other improvement of a lot done independently, and not as a necessary part of the construction of a building. (*Macomber v. Bigelow*, 58 P. 312; for sec. 1191 in full see sec. 9, *supra*.)

Comments on statutes. Division of subject.

Sec. 95. The provisions of sections 1183, 1184 and 1192 above quoted show that it was the intention of the legislature to give liens to the persons named in section 1183:

1. Upon the "property" (specially stated in that section) upon which they have bestowed labor or for which they have furnished materials, (sec. 1183);

2. Upon the land, or the estate therein, of the contracting-owner, if he owned the land, or an estate therein, at the time of the commencement of the work or of the furnishing of the materials for the building, etc., (sec. 1185); and

3. Also upon the land, or the estate therein, of any person other than the contracting-owner, or of any person "having or claiming an interest therein," if such person or persons other than the contracting-owner, fail to give the written notice disclaiming responsibility required by section 1192. (*West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 P. 231.)

In considering the subject matter of this chapter we will, therefore, follow the above division, which more briefly stated is as follows:

1. The "property" upon which the labor is bestowed and for which the materials are furnished, (sec. 1183);

2. The land or estate therein of the contracting-owner, (sec. 1185); and

3. The land or estate therein of the non-contracting owner (sec. 1192), and herein of notice of non-responsibility.

Property subject to lien.

Sec. 96. Section 1183 names twelve separate and distinct "properties" followed by the words "or other structure," upon which it gives a lien for labor bestowed and materials furnished in their construction, etc. (See sec. 1183 quoted, *supra*.) In this section no mention is made of the "land" upon which the building, etc., is constructed, nor does it expressly give a lien upon the "land." The lien upon the "land" is given by sections 1185 and 1192.

The question arises, therefore, whether it was the intention of the legislature to give a lien upon the building, wharf, etc., independently of a lien upon the land upon which the building or other structure or improvement is constructed. Or, since the "properties" mentioned in section 1183 are, when separated from the land, personal property, was it the intention of the legislature, by the provisions of section 1183, to give a lien upon personal property.

This question, under the statute as it now stands, has not been directly determined. (See *dictum* in *Pacific etc. Co. v. Fisher*, 109 Cal. 569, 42 P. 154; and *Fresno L. & S. Bank v. Husted*, 49 P. 195.) It came up, however, in *McGreary v. Osborne*, 9 Cal. 119, where the court had under consideration the lien act of 1856 (stat. 1856, 203), the first and fourth sections of which correspond to sections 1183 and 1185 of the present lien law and the tenth section of which (expressly providing for a lien upon personal property) corresponds to section 3052 of the Civil Code.

The decision of the court, however, was not based upon section ten of the act of 1856, and it was held that under the other provisions of that act, a machinist who had performed work upon machinery put into a leased mill by a tenant and fastened by bolts, screws, etc., to the mill, was entitled to a lien thereon for his work although the machinery was personal property which could be removed by the tenant. (See *March v. McCoy*, 56 Cal. 85; *Fresno etc. Bank v. Husted*, *supra*.)

The same. Personal property.

Sec. 97. Section ten of the lien act of 1856, just cited, providing for liens upon personal property generally, has, in substance, become section 3052 of the Civil Code and belongs to chapter VI, div. II, part IV, title XIV of that code which treats of liens other than those of mortgage, pledge, bottomry, and respondentia. Section 3059 of the same chapter provides:

"The liens of mechanics, for materials and services upon real property, are regulated by the Code of Civil Procedure."

To the section just quoted the code commissioners added the following note:

"Note. See chapter on mechanic's liens, in Code of Civil Procedure, commencing with section 1184."

By this note the code commissioners eliminated section 1183 from their reference to liens upon real property and it would thereby seem that section 1183 was enacted for the purpose, as stated in it, of giving liens upon the "property" upon which work has been done and for which materials have been furnished and this although such "property" partakes of the nature of personal property.

Section 3052 of the Civil Code, already referred to provides:

"A person who makes, alters, or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid."

This section, it will be observed, gives a lien in those cases only where the property is in the possession of the person who makes, alters or repairs the same and the lien depends upon the continued possession of the property by such person.

The same. Personal property. Rule laid down.

Sec. 98. It is believed the correct rule to be deduced from these statutory provisions is this:

Section 1183 gives a lien upon the "property" though in the law of fixtures such "property" is personal property and may, therefore, be removed or severed from the realty, but that such lien is given upon such property in those cases only where the owner of the property has some interest or estate in the land upon which the fixture has been constructed or repaired, etc., and that moveable personal property generally, not in the nature of fixtures, of which possession may be taken and retained by the person who makes, alters or repairs the same, is not within the provisions of section 1183, but within section 3052 of the Civil Code.

This rule may, at first glance, seem to be at variance with the decision in *McGreary v. Osborne*, 9 Cal. 119, *supra*, where the following language was used:

"The object of the act [secs. 1 and 4, 1856, 203] was to give the mechanic a lien upon whatever interest the person had who caused the superstructure to be made. If the party owned only the superstructure, then the lien would only attach to that; but if he also owned the land, the lien would also embrace it. And any interest in land which could be sold under execution would be the subject of such a lien. * * * From the *quasi* moveable character of the property [machinery] involved in this case, the plaintiff could not take and keep possession of it, as of that kind of personal property mentioned in the tenth section [sec. 3052 Civil Code]. This state of the case was foreseen by the framers of the act; and, therefore, *the lien was given upon the superstructure itself, as distinct from the land.*"

This language, however, must be construed with reference to the facts before the court. These facts were that the contracting-owner was a tenant in possession under a lease. He had therefore, an "estate" or "interest" in the land, and under the present statute, as under the lien act of 1856, the

lien of the machinist who repaired the machinery would attach to the "superstructure" and also to the estate or interest of the contracting-owner in the land. (Sec. 102, *infra*.)

It will be found that in every case in which this question has arisen, the contracting-owner had an estate or interest in the land. (See *March v. McCoy*, 56 Cal. 85; *Lothian v. Wood*, 55 Cal. 159; secs. 99, 100, *infra*.)

Fixtures and Machinery.

Sec. 99. It is not within the scope of this work to present the general law of fixtures. The Civil Code of this state (secs. 660, 1013, 1019) declares the law upon this subject and there are numerous decisions illustrating and applying the rules there laid down. It is proposed to bring together here those decisions only which have special bearing upon the mechanic's lien law.

The question whether materials (counters) are affixed to the building so as to become part of it, is a question of fact. (*Bianchi v. Hughes*, 124 Cal. 24, 56 P. 611.)

In *McGreary v. Osborne*, 9 Cal. 119, the frame building in question rested on piles driven into the earth. The basement floor was on the ground, and in this building machinery for a flouring mill was put up. The frame upon which the machinery was placed was supported by props from the basement story, and was also fastened to the building by screws, bolts and nails. The machinery had been put up by a lessee of the building during the term of his lease. Plaintiff made repairs to the machinery, and brought this action to enforce his lien upon the machinery. It was held that plaintiff was entitled to a lien upon the machinery to the extent of the interest therein of his employer, notwithstanding that the latter had transferred his interest in the lease and the machinery to another.

The court say:

“ The rule in reference to fixtures is applied with different degrees of strictness as between different parties * * * As between the landlords and tenants in this case, there would seem to be no doubt as to the right of the latter to remove the machinery. But, as between vendor and vendee, the machinery would be considered as part of the realty.”

So, where machinery is sold for the purpose of being placed in a building owned by the vendee, with a view of converting it into a manufactory, and is actually used for that purpose, the vendor has a mechanic's lien upon the building for the price. (*Donahue v. Cromartie*, 21 Cal. 80.)

In *Lothian v. Wood*, 55 Cal. 163, it was doubted whether so-called buildings consisting of swings and seats, and a dancing house resting upon sills without doors or windows, were fixtures within the meaning of the lien law, for which the owner of the land would be chargeable with notice under section 1192 of the C.C.P. (See *March v. McKoy*, 56 Cal. 85.)

Fixtures and machinery continued.

Sec. 100. A pump sold to be used in waterworks, if affixed to the other works by being planted down on the ground and connected to pipes so as to admit the steam and water, is affixed to the land within the meaning of section 660 of the Civil Code, and is, therefore, within the mechanic's lien law. (*Goss v. Helbing*, 77 Cal. 190, 19 P. 277.)

When a tenant has erected a building on a leased lot, which largely increases the rental value of the premises, even if the building is subject to removal at the expiration of the lease, he cannot object on that ground to having the lien charged upon his interest in the land, if the lease provides that the building cannot be removed until all taxes, rents and debts are paid, under which provisions the landlord may insist that the amount of such lien paid to protect

his realty shall be paid before removal of the building. (West Coast L. Co. v. Apfield, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231.)

The above leased lot was vacant, and the lease granted no express right to remove a building permanently erected thereon, and the tenant covenanted to surrender at the expiration of the term "in as good state and condition as reasonable wear and tear will permit, damage by the elements excepted." It was held that the lease included all buildings which became appurtenant to the land by being embedded in it and permanently resting upon it, and that there was no right of removal, except of such buildings as did not partake of the realty.

One contributing labor or materials to a structure (mill), which is an appurtenance to a mine, or which, when constructed, is to form part of it, must be held to have anticipated its use, and cannot claim a lien upon the structure upon the ground that the lien attached before its use in connection with the mine. (Williams v. Mining Co., 102 Cal. 134, 34 P. 702, 36 P. 388.)

In this case the claim was filed against the particular structure. It should have been filed against the whole mining claim. The claim of lien was, therefore, void, and it was sought to enforce the lien against the particular structure on the theory that the work, etc., was performed upon it before it became appurtenant to the mine.

Mines, tools and machinery,

Sec. 101. Section 661 of the Civil Code provides:

"Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine."

Section 1183 of the C.C.P., provides: *inter alia*,

"Any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and

used by the owners for reducing the ores from such mining claim or claims," etc.

Tools and machinery (iron pipes, giants, etc.), used in the development of a mine, are, while so used, to be considered as affixed to the mine, and work upon such tools and machinery is work upon the mine. (*Malone v. Big Flat G. M. Co.*, 76 Cal. 578, 18 P. 772.)

But where a mining company held a lease of certain mining machinery and implements belonging to another company at a fixed rental, with option to purchase, with a proviso that title should remain in the lessor until the purchase money was paid, such portion of the machinery and implements as were not used in the working or developing of the mine, nor in any manner affixed thereto, were not part of the realty, nor subject to the liens of laborers upon the mine. (*Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 P. 378. See *Jordan v. Myers*, 58 P. 1061.)

Part of building or structure.

Sec. 101a. A lien for work and materials cannot be acquired upon a portion of an entire improvement. (*Cox v. Railroad*, 44 Cal. 18; *Brigham v. Knox*, 59 P. 198.)

The statute gives a lien upon the entire building for any portion of the work done or materials furnished therefor, and there is no provision for a lien upon a portion of a building, or for the sale of a part of a building to satisfy a lien upon the whole. (*Williamette etc. Co. v. Kremer*, 94 Cal. 205, 210, 29 P. 633; *Williams v. Mining Co.*, 102 Cal. 134, 140, 34 P. 702, 36 P. 388.)

But this rule does not apply where liens are claimed for labor and materials furnished in the construction of additions to a building upon part of a lot, (*Brunner v. Marks*, 98 Cal. 374, 33 P. 265,) and where the void original contract embraces several buildings, the lien is properly confined to the building upon which the work was done (*Macomber v. Bigelow*, 58 P. 312).

Nor to buildings structures and improvements upon a mining claim. The claim should be against the whole mining claim. (See sec. 249, *infra*.)

Nor to one of four divisions of a canal constructed under separate contracts for each division. (Pacific etc. Co. v. Bear Valley etc. Co., 120 Cal. 94, 52 P. 136; Cox v. Railroad, *supra*; for joint claims, see sec. 243, *et seq.*, *infra*.)

Land, or estate therein of contracting-owner.

Sec. 102. Section 1185, quoted at the beginning of this chapter, provides that the land upon which any building, improvement, well, or structure is constructed, etc., "is also subject to the lien, if at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, well or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

The meaning of this section is, that the interest or estate in the land of the contracting-owner, whether such interest or estate is legal or equitable—an absolute fee simple or a tenancy at will—that is, any interest or estate which can be sold under execution—is subject to liens for work done upon and materials furnished for the building, etc., situated upon the land. (West Coast L. Co. v. Newkirk, 80 Cal. 275, 22 P. 231, McGreary v. Osborne, 9 Cal 119; Lothian v. Wood, 55 Cal. 159; mortgagee in possession, Ferguson v. Miller, 6 Cal. 403; equitable interest, Crowell v. Gilmore, 13 Cal. 55; vendor, Hinckley v. Biscuit Co., 91 Cal. 136, 27 P. 594.)

This section does not give a lien upon the interest or estate in the land of any person other than "the person who caused the building, etc., to be constructed." (See chap. III, sec. 40, *supra*.) If, for instance, a lessee in possession erects a building upon the leased land, there is nothing in this section which gives to his contractor, laborer or mate-

rialman, a lien upon the lessor's estate in the land. (*Guy v. Carriere*, 5 Cal. 511; *Johnston v. Dewey*, 36 Cal. 623; *Worden v. Hammond*, 37 Cal. 61; *Fresno etc. Bank v. Husted*, 49 P. 195, house moved on lot.)

If, however, the person who caused the building, etc., to be erected, is the owner of the fee simple to the land upon which it is erected then, under this section, the lien attaches to the whole and every estate in the land.

The same. Equitable estates.

Sec. 103. The lien of mechanics for labor performed and materials furnished towards the erection or repair of a building attaches though the employer has but an equitable estate in the land upon which the building is erected, under a lease and agreement to convey from the owner of the fee. (*Crowell v. Gilmore*, 13 Cal. 55).

And also attaches to the interest of the contracting-owner who has a contract of sale from the owner of the fee to the land upon which the former erects buildings. (*Worden v. Hammond*, 37 Cal. 61.)

So, where a person enters into the possession of a house and lot with the consent of the owner of the fee, and makes repairs on the house by the permission of the owner, under a parol agreement with the owner to pay for such repairs, and to purchase the property, the mechanics and material-men who furnish the material and do the work, can enforce liens upon the premises for their labor and materials, even if the person who makes the repairs does not effect a purchase. (*Moore v. Jackson*, 49 Cal. 109.) In this case the estate of the owner of the fee was also held subject to the liens on the ground that the person who made the repairs was the agent of the owner of the fee. (See *Guy v. Carriere*, 5 Cal. 511.)

One holding the legal title to land, who enters into a contract with a corporation to construct a factory thereon under his direction, in consideration of a transfer to him

before the erection of the building, of a certain number of shares of its capital stock, and agrees to convey the building after its completion, together with the land upon which it stood, to the company, is the owner of the building, and not a contractor within the meaning of section 1183.

And the corporation having paid the agreed price for the building, is the equitable owner thereof, and the equitable estate is equally bound with the legal to satisfy the liens of mechanics and materialmen growing out of the contract made with the holder of the legal title in the construction of the building. (*Hinckley v. Field B. Co.*, 91 Cal. 136, 27 P. 594.)

The same. Leasehold estates.

Sec. 104. Where a mechanic's lien attaches upon a leasehold interest, it so attaches, subject to all the conditions of the lease; but if one of the conditions be forfeiture for non-payment of rent, the mere failure to pay will not make a forfeiture; there must be a formal demand made on the day it becomes due, to affect this, and a waiver of the demand will never be implied for the purpose of working a forfeiture.

The surrender of a leasehold estate operates as a merger in the fee, but this cannot be suffered to defeat a mechanic's lien which attached upon the property before the merger took effect.

A party holding a mechanic's lien on a leasehold estate has a right to enforce it, notwithstanding a subsequent failure of the lessee to pay rent and a surrender of the lease to the lessor. (*Gaskill v. Trainer*, 3 Cal. 335.)

Improvements made by an owner of property, after the surrender of a lease by a tenant, upon whose leasehold interest a mechanic's lien had previously attached, can no more impair this lien than if made by the tenant himself. (*Gaskill v. Moore*, 4 Cal. 233.)

The lien attaches to such interest only as the lessee has in the land at the date of the accruing of the lien. (*Loth-*

ian v. Wood, 55 Cal. 159, West Coast L. Co. v. Newkirk, 80 Cal. 275, 22 P. 231.)

A lessee who erects buildings upon leased land cannot object to having his interest in the land subjected to the liens of mechanics and others on the ground that, by the provisions of the lease, he has the right to remove the building at the expiration of the lease, if the lease provides that the building cannot be removed until all taxes, rents and debts are paid, under which provisions the landlord may insist that the amount of such liens paid to protect his realty, shall be paid before removal of the building. (West Coast L. Co. v. Apfield, 86 Cal. 335, 24 P. 993, s. c. 22 P. 281.)

Land or estate therein of non-contracting owner under section 1192 of the C. C. P.

Sec. 105. Section 1192 quoted at the beginning of this chapter, is the only statutory provision which gives the right to a lien upon the land or the estate therein of the "owner" or person having or claiming an interest therein, as contradistinguished from the contracting-owner. The right to a lien upon the land or upon an estate therein under section 1192 is not absolute. According to this section it depends upon the existence of at least three facts:

1. The work must have been done and the materials furnished for the construction of a building or other structure or improvement mentioned in section 1183, and the building or other structure or improvement must have been constructed upon the lands of such "owner," or of the person having or claiming an interest therein;

2. Knowledge by the "owner" or person having or claiming an estate in the land, of the construction, alteration or repair, or of the intended construction, alteration, or repair, of such building or other structure or improvement, upon his land, or upon the land in which he has, or claims, an estate.

3. Failure of the "owner" or person having or claiming an estate in the land, to give notice by posting, as provided in section 1192, that he will not be responsible for the "same."

Before presenting these subjects, it will be necessary first to determine who is an "owner or person having or claiming any interest" in the land within the meaning of section 1192.

Neither a minor who is the owner of land nor his guardian is an owner within the meaning of this section. Where, therefore, buildings are constructed upon the land of a minor the fact that both he and his guardian have knowledge of the construction of the building does not subject such property to liens though they fail to give the notice of non-responsibility required by the statute. (*Schwartzberg v. Gross*, Superior Ct. L. A. Co., 1896, Judge York.)

Mortgagee not "owner" within section 1192.

Sec. 106. To be an "owner" within the meaning of section 1192, the person whose property is sought to be charged thereunder with liens, must have an estate or interest in the land which can be sold and conveyed. The estate or interest must be such that it can be reached by execution and be sold thereunder.

In *Williams v. Santa Clara M. Co.*, 66 Cal. 193, 5 P. 85, the court, holding that a mortgagee under a prior recorded mortgage was not an "owner" within section 1192, at page 200, say:

"The section [1192] provides a mode for binding the owner or person having an interest, that is, one having a legal estate less than a fee, or such an equity as may be enforced by securing a transfer of a legal estate. * * * But it is well settled in this state that a mortgage is merely a lien on and passes no estate or interest in, the mortgaged premises, except for the purposes of taxation.

* * A mortgagee has neither *jus in re* nor *jus*

ad rem. * * * It is manifest that one having such a right has not 'an interest in the lands' on which a building or improvement may be constructed within the meaning of section 1192 * * The section of the code refers to an estate or interest in land which may be sold and conveyed and does not provide that a mere lien shall become subject to another subsequent lien."

(See to the same point *Preston v. Sonora Lodge*, 39 Cal. 116, *Kuschel v. Hunter*, 50 P. 397. For general discussion of who is owner within the meaning of section 1192, see sec. 41, *supra*.)

Trust Deed. Grantee thereunder "owner" within section 1192.

Sec. 107. A trust deed of real estate, taken by a person who loans money to the owner, defeasible on payment of the debt, is something more than a mortgage. It conveys the legal title and an interest in the land, and is, therefore, fully within the letter and spirit of section 4 of the lien act of 1868, (stat. 1868, 589, sec. 1192 of the C. C. P.)

Where, therefore, an insurance company loaned money to the owner of a lot and uncompleted building, for the purpose of finishing the building, and took from him a deed of trust conveying the fee, defeasible on the payment of the debt, and afterwards knowingly permitted the building to go on without giving notice that it would not be responsible therefor, under section 4 of the lien act of 1868, the interest in the property held by the insurance company was subject to mechanics' liens for work done and materials furnished after the making of the trust deed. (*Fuquay v. Stickney*, 41 Cal. 583.)

Lessor is "owner" within section 1192.

Sec. 108. The interest of the owner in lands leased is subject to a lien for materials used in the construction of a building thereon, erected under contract by the lessee, if the owner has knowledge, etc., and fails to give notice that

he will not be responsible for the same. (*Harlan v. Stufflebeem*, 87 Cal. 508, 25 P. 686; *Hines v. Miller*, 122 Cal. 517, 55 P. 401; *Phelps v. Mining Co.*, 49 Cal. 337; *West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 P. 231; *West Coast L. Co. v. Apfield*, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231.)

Where improvements to the building were constructed by the lessee with the previous knowledge and permission of the owner, his failure to give notice required by section 1192 rendered his interest in the land subject to the lien of one furnishing materials for the improvements; and it is immaterial whether they were constructed in the particular form, or at the particular place which was authorized by the owner. (*Santa Monica L. & M. Co. v. Hege*, 119 Cal. 376, 51 P. 555; *Hines v. Miller*, *supra*.)

Vendor is "owner" within Section 1192.

Sec. 109. Under section 1192 the vendor, under a contract of sale of land, with knowledge that the vendee is constructing a building thereon, must give notice that he will not be responsible for the improvements, else his interest in the land, to its entire extent, becomes subject to liens filed pursuant to the law regulating mechanic's liens. (*Avery v. Clark*, 87 Cal. 619, 25 P. 919.)

So, where a person enters into the possession of a house and lot with the consent of the owner, and makes repairs on the house by the permission of the owner, under a parol agreement with the owner to pay for such repairs, and to purchase the property, the mechanics and materialmen who furnish materials and do work, can enforce liens on the premises for their labor and materials even if the person who makes the repairs does not effect a purchase. In such case the person who makes the repairs is the agent of the owner and the owner's estate is bound by the lien. (*Moore v. Jackson*, 49 Cal. 109.)

But a person who has a vendor's lien upon the property against which mechanics' liens are claimed, is not an

"owner" within the meaning of section 1192. (*Kuschel v. Hunter*, 50 P. 397.)

Nor is one an "owner" within this section who leased machinery to persons in possession of land under contract to purchase the same, though the machinery is affixed to the soil. (*Jordan v. Myres*, 58 P. 1061.)

Work, etc. under section 1191 not within section 1192.

Sec. 110. Section 1191 of the C. C. P. gives a lien to any person who at the request of the reputed owner of any lot therein mentioned grades, fills in, or otherwise improves the same, or the street or sidewalk in front of, or adjoining the same, or constructs any areas, or vaults or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith. (See sec. 9, *supra*, for this section in full.)

The real owner of such a lot is not required to give notice disclaiming responsibility for work done under the section above referred to. Section 1192 limits the right to liens to the buildings or other improvements mentioned in section 1183 and section 1191, which alone provides for work upon a lot, etc., contains no provision of this nature. (*Santa Cruz etc. Co. v. Lyons* 117 Cal. 212, 48 P. 1097.)

In the case above stated, it was held that the fact that the real owner of the lot knew of the work while it was being performed and neither made objection thereto, nor gave any notice that he would not be responsible therefor, did not entitle the contractor to a lien.

Work, etc., on mining claim when within section 1192.

Sec. III. Work consisting of "drifting in a tunnel" is not the construction, alteration, or repair of any building or improvement on, or in, a mine, within the meaning of section 1192 and a laborer doing such work, at the instance

of a person not the owner, is not entitled to a lien therefor upon the owner's failure to post notice of non-liability, provided for by that section. (*Jurgenson v. Diller*, 114 Cal. 491, 46 P. 610.)

At page 493 the court say:

"It is equitable to require the owner, who sees going forward an unauthorized building or other beneficial improvement upon his property, to give notice that he will not be responsible therefor * * *; but this consideration fails when the work consists in a subtractive process—the removal of the very corpus of the property; as well require one who sees a trespasser cutting his timber to post notice of his non-liability, under penalty of having his land subjected to a lien for the labor." (See *Hines v. Miller*, 122 Cal. 517, 55 P. 401.)

Work, however, done by lessees in sinking a shaft under a lease from the owners of a mine, which by its terms expressly provides that the lessees may sink shafts and run tunnels in working and developing the mine, and that the lessors are to receive one-fourth of the gross output, must be deemed done with the knowledge of the owners; and in the absence of the notice by the owners provided for in section 1192 disclaiming responsibility therefor, liens may be enforced against them by laborers employed in the work. (*Hines v. Miller*, *supra*; *Hamilton v. Delhi etc. Co.*, 118 Cal. 148, 50 P. 378; but see *Williams v. Santa Clara etc. Co.*, 66 Cal. 193, 200, 5 P. 85.)

Section 1192. Land or estate therein of non-contracting owner subject to lien. Scope of section.

Sec. 112. The language of section 1192 is that "every building or other improvement mentioned in section 1183 of this code, constructed upon any lands" * * * shall be held to have been constructed at the instance of the owner, etc.

The building or other improvement for the construction of which the land or the estate therein of the non-contracting owner is made subject to liens are those, and those only, which are mentioned in section 1183, and it follows, therefore, that such owner is not required to give notice of non-responsibility in cases where the building or other improvement is one not mentioned in section 1183 (*Jurgenson v. Diller*, 114 Cal. 491, 46 P. 610); nor for work not authorized by that section, as, for instance, the grading or improving of a lot under section 1191 (*Santa Cruz etc. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097); or for the construction of swings, seats, etc. (*Lothian v. Wood* 55 Cal. 159.)

The building or other improvement must not only be one of those mentioned in section 1183, but in order to charge the land of the non-contracting owner or his estate therein, under section 1192, a claim of lien must have been filed in accordance with the provisions of the lien law. This section, of course, presupposes a valid claim of lien without which there is no right on the part of a lien-claimant to charge the land, or the estate therein with his lien.

Section 1192, might at first glance, seem to be more limited in its scope than section 1183. The latter section gives a lien for work done and materials furnished in the "construction, alteration, addition to, or repair" of any building, etc., or other structure. The language of the former section is that every building or other improvement "constructed" upon any lands, etc. A subsequent clause of the same section in fixing the time after which notice of non-responsibility must be given, makes use of the terms "construction, alteration or repair." It is believed, however, that the scope of section 1192 is as broad as that of section 1183, and that the land or other interest therein of the non-contracting owner, may be subjected to liens in those cases in which the latter section gives the right to such liens.

Section 1192. Knowledge by non-contracting owner of construction of building, etc. Notice.

Sec. 113. Section 1192 provides, *inter alia*, that:

"Every building or other improvement constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein * * * shall be subject to any lien," etc.

As pointed out in a subsequent section (sec. 140, *infra*) the power of the legislature, as expressed in section 1192, to charge the property of the non-contracting owner with liens grows out of the doctrine of equitable estoppel. One of the essential element of estoppel is knowledge of the facts out of which the estoppel arises, or actual notice of circumstances sufficient to put a prudent man upon inquiry as to those facts. The general rule of notice is declared in section 19 of the Civil Code of this state, as follows:

"Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The question in every case arising under section 1192, is, therefore, whether the non-contracting owner had knowledge of the construction of the building or other improvement upon his land, or actual notice of circumstances sufficient to put a prudent man upon inquiry by the prosecution of which he might have learned of such construction.

It will be observed that this section requires that the "owner" shall have actual notice of circumstances sufficient to put a prudent man upon inquiry as to the fact of construction, but having actual notice of such circumstances, he is charged with notice of the construction in all cases in which by prosecuting such inquiry he might have learned of such construction. The cases cited in the following sections illustrate and apply the rule laid down.

Knowledge by non-contracting owner of construction, etc. The decisions.

Sec. 114. In *Moore v. Jackson*, 49 Cal. 109, the lessee entered into the possession of the house and lot leased, with the consent of the owner and made repairs on the house by the permission of the owner thereof under a parol agreement with the owner to pay for such repairs, and it was held, under these facts, that the owner had knowledge of the construction, and that his estate in the lot was, therefore, subject to the lien filed thereon for such repairs.

So, in *West Coast L. Co. v. Apfield*, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231, where the lessor stood by and saw his tenants erect a building upon his lot, his estate in the lot was held to be subject to liens filed for work and materials done and furnished in the construction of the building where he had failed to give notice of non-responsibility.

Again, in *Santa Monica etc. Co. v. Hege* 119 Cal. 376, 51 P. 555, s. c. 48 P. 69, the lessee under a verbal lease, obtained permission from the lessor to construct certain additions to the building on the leased lot, and it was held that thereby the lessor was charged with knowledge and that his estate in the lot was subject to the lien filed, no notice disclaiming responsibility having been given by him.

Work done by lessees in sinking a shaft under a lease from the owners of a mine which, by its terms, expressly provides that the lessees may sink shafts and run tunnels in working and developing the mine, and that the lessors are to receive one-fourth of the gross output, must be deemed done with the knowledge of the owners; and in the absence of notice given by the owner disclaiming responsibility, liens may be enforced against them by laborers employed in the work. (*Hines v. Miller*, 122 Cal. 517, 55 P. 401. See *Hamilton v. Mining Co.*, 118 Cal. 148, 50 P. 378.)

In another case A went into possession of certain lots, then owned by B under contract of purchase, built and paid for a house thereon, and afterwards removed the house

upon the land of C, as a temporary resting place, without B's permission, and after default in payment for the lots; and it was held that it could not be implied that B furnished the materials with which the house was built, nor that A acted, at the time of constructing the house, as the agent of C, so as to subject C's lot to a lien, notwithstanding C failed to give notice disclaiming responsibility. (*Fresno etc., Bank v. Husted*, 49 P. 195.)

Knowledge by non-contracting owner of construction of building, etc. Corporations.

Sec. 115. In *Phelps v. Maxwell Creek G. M. Co.*, 49 Cal. 336, the corporation defendant leased its mine to Douglas who, while in possession and before his term of lease expired, erected a quartz mill upon the leased premises, and employed laborers and contracted with materialmen for material for which liens were sought to be enforced against the estate of the corporation in and to the mine. During the progress of the work, the president of the corporation, lessor, visited the premises, and was informed of the construction of the quartz mill, and it was held that this was sufficient to charge the corporation with knowledge of the fact that the work was going on, and since it had not given notice of non-responsibility, to subject its estate in the premises with the liens.

Upon quite similar facts, however, it was held in *Lothian v. Wood*, 55 Cal. 159, where a corporation had leased its premises, and the lessee had constructed thereon certain buildings upon which premises materialmen claimed liens for material furnished for such buildings that the mere fact that a director of the corporation, on one occasion, was present during the construction of the building, did not constitute notice to the corporation so as to charge its estate in the premises with such liens. In this case, however, the structures were held not to be those against which liens could be claimed under the lien law.

In *Ayers v. The Green Gold M. Co.*, 116 Cal. 333, 48 P. 221, it was held that where, in an action to enforce a lien for work done in cleaning out a tunnel on the mining property of a corporation defendant, the work was done wholly upon the individual credit of one of the directors of the corporation, and wholly apart from any official relation of such director to the corporation, the doctrine of constructive notice to the corporation of the doing of the work was inapplicable, and that no lien could be enforced against the property of the corporation for the work done notwithstanding no notice disclaiming responsibility had been given.

Knowledge by non-contracting owner of intended construction of building, etc.

Sec. 116. Section 1192 subjects the land of the non-contracting owner, or his estate therein, to liens as well when he has knowledge of the *intended* construction of a building or other improvement thereupon, as when he has knowledge of the actual present construction of such building or improvement. The rule of knowledge or notice is the same in either case.

In *Evans v. Judson*, 120 Cal. 282, 52 P. 585, it was held that under a lease for six months giving the lessee the privilege to make and remove certain improvements, but providing contingently that if the improvements should be incorporated with the existing structures, so that removal would leave the latter in worse condition than at the date of the contract, they were to become the property of the lessor, the lessor had sufficient interest in the *contemplated* improvements, and sufficient knowledge of the *intentions* of the lessee, to make the improvements, to put him upon inquiry as to the nature of the improvements made, and to charge him with notice of the improvements, and to make the land subject to the liens filed in the absence of notice disclaiming responsibility for the improvements.

The court, at page 284, say:

"Here the term of the lease was brief, and the instrument provided contingently for the participation of the landlord in the benefit of the improvements; it knew, therefore, that such improvements must, if made at all, be made speedily, and that they might be of a permanent character; being a party thus materially interested, it had notice 'of circumstances sufficient to put a prudent man upon inquiry as to a particular fact,' viz.: the actual improvement which followed shortly, and was charged with knowledge thereof, for by prosecuting the inquiry, it might have learned such fact." (Citing section 19 of the C.C. To the same point see *Hines v. Miller*, 122 Cal. 517, 55 P. 401; *Santa Monica etc. v. Hege*, 119 Cal. 376, 51 P. 555; s. c. 48 P. 69; *Moore v. Jackson*, 49 Cal. 109.)

Notice of non-responsibility. The statute. Comments on.

Sec. 117. Section 1192 provides that every building or other improvement constructed upon any lands with the knowledge of the owner, or person having or claiming any interest therein, etc., and such land or interest, shall be subject to any lien filed in accordance with the provisions of the lien law, "unless such owner or person having or claiming any interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon." (See sec. 10, chap. I, *supra*, for the section in full, amendments and notes.)

Section 1192, as we have seen, is based upon the equitable doctrine of estoppel the foundation for which is stated to be that where a land owner stands by and knowingly and silently permits another person to expend money in the construction of buildings or other improvements upon his

land on the supposition that such other person owns the land, he cannot afterwards defeat mechanics' liens for such construction by insisting that the land is his own. It becomes the duty of the real owner in such case, as soon as he has knowledge of the facts, to notify the person who is constructing, or who contemplates constructing such buildings or other improvements, of his estate or interest in the land. If he fails to give such notice the plainest principles of equity justly and forever estop him from setting up his title to the land in opposition to such liens.

Section 1192 has given statutory force and effect to this principle, and has prescribed the mode of giving, and the contents of, the notice which shall be deemed sufficient.

Notice of non-responsibility. Statutory requirements of notice.

Sec. 118. In equity, notice by the real owner of the land to the person improving or contemplating improving the same, is not required to be in any particular form, and it may be either oral or in writing. The notice under section 1192, however, must be in writing, but there is nothing in the statute which requires it to be signed or subscribed by the owner giving notice. Signing or subscribing the notice, therefore, is not necessary to its validity where the notice otherwise shows, as it must show, who is the owner giving notice. (See *Joost v. Sullivan*, 111 Cal. 294, 43 P. 896, sustaining the validity of a memorandum of contract which was not signed.)

Section 1192 requires the owner to "give notice that he will not be responsible for the same (that is, for the construction of the building or other improvement mentioned in section 1183), by posting a notice in writing to the effect," etc.

The contents of the notice must, under this provision, be sufficient to show who the person is giving notice and who disclaims responsibility. The notice must, therefore, state

the name of the owner giving notice and contain a statement to the effect that the person named will not be responsible for the construction, or the intended construction, of the building or other improvement. The statute requires no other statement.

Notice of non-responsibility. Time of posting notice.

Sec. 119. Section 1192, *inter alia*, provides that the "owner" of the land, or the person having or claiming an interest therein, "shall within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, [of the building or other improvement mentioned in section 1183] give notice that he will not be responsible for the same, by posting" etc.

Knowledge by the non-contracting owner of the construction, alteration or repair, or of the intended construction, alteration or repair, of the building or other improvement, or actual notice of circumstances sufficient to put a prudent man upon inquiry, as to such fact (see 116, *supra*) is the event or time within three days after which the owner must give notice by posting, etc.

It will be observed that it is made the duty of the owner, if he wishes to prevent his land from being charged with liens under this section, to give notice disclaiming responsibility as well when he has obtained knowledge, or has actual notice, etc., of the actual present construction, etc., as when he has knowledge of actual notice, etc., of the *intended* construction, etc., of the building or other improvement. In either case the time within which to give notice is limited to three days after he has obtained knowledge or has actual notice, etc.

Notice of non-responsibility. Manner of posting notice.

Sec. 120. Section 1192, *inter alia*, provides that the notice shall be given "by posting a notice in writing to the effect in some conspicuous place upon said land, or upon the building or other improvement."

The modes of posting the notice are pointed out by the statute—(1) upon the land or (2) upon the building or structure. The first mode evidently is intended for cases of intended construction and the second for actual present construction. The statute, however, must be followed. A failure to comply with it will subject the non-contracting owner to the liability imposed upon him by it.

The notice must also be posted in a "conspicuous place." If, therefore, the notice is not posted in a conspicuous place, the lien will attach to the land. (*Silvester v. Coe Quartz M. Co.*, 80 Cal. 510, 22 P. 217.)

Notice of non-responsibility. Effect of failure to give notice.

Sec. 121. Section 1192, *inter alia*, provides that the land or the interest therein of the non-contracting owner or the person having or claiming an interest therein shall be subject to any liens filed in accordance with the provisions of this chapter, unless such owner shall give the notice therein provided for.

Given that the building or other improvement is one of those mentioned in section 1183; that it was constructed upon the land of the non-contracting owner or person having or claiming an interest therein, and with his knowledge or with actual notice of facts sufficient to put a prudent man upon inquiry as to the fact of the construction or intended construction, etc., and that a valid claim of lien has been filed in accordance with the provisions of the lien law—the effect of a failure of such owner, or other person, to give notice of non-responsibility, is to charge the land or the estate therein of such person with the lien. (*Harlan v.*

Stufflebeem, 87 Cal. 508, 25 P. 686; West Coast L. Co. v. Newkirk, 80 Cal. 275, 22 P. 231; Fuquay v. Stickney, 41 Cal. 583.)

But it does not render him personally liable. (West Coast L. Co. v. Newkirk, *supra*.)

But all the facts stated must exist as a foundation for a right to a lien upon the property of the non-contracting owner under section 1192. If, for instance, the building or improvement is one not mentioned in section 1183, though it may have been constructed with the actual knowledge of the owner of the land, such land is not chargeable with liens notwithstanding the non-contracting owner has not given notice of non-responsibility. (Santa Cruz etc. Co. v. Lyons, 117 Cal. 212, 48 P. 1097; Lothian v. Wood, 55 Cal. 159.)

So, if such owner neither has knowledge of the construction or of the intended construction, etc., of the building nor actual notice of circumstances, etc., his land cannot be charged with liens, though every other requirement of section 1192 has been fulfilled.

Particular Property. Homestead.

Sec. 122. Section 1241 of the Civil Code as it stood upon the amendment to it of 1880, provided:

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained: * * *

2. On debts secured by mechanics', laborers' or vendors' liens upon the premises; * * *"

In 1887 (stat. 1887, 81) this subdivision of section 1241 was amended so as to read:

"2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises."

Section 1240 of the same code also provides:

"The homestead is exempt from execution or forced sale, except as in this title provided."

In *Richards v. Shear*, 70 Cal. 187, 11 P. 607, materials were furnished by the plaintiff to the husband, to be used, and which were used, in the construction of a building on the homestead premises. The materials were furnished after the property had been impressed with the homestead. It was held that under section 1241 of the Civil Code as it stood in 1886, the plaintiff was not entitled to a lien upon the homestead for the materials furnished.

In *Walsh v. McMenomy*, 74 Cal. 356, 16 P. 17, the materials were furnished before the homestead was declared upon the premises but the claim of lien was filed for record after the record of the declaration of homestead. This case arose under section 1241 as it stood in 1885, and it was held that the materialman was not entitled to a lien upon the premises and that such lien could not be enforced against the premises.

Under the section as it now stands upon the amendment of 1887, the homestead premises are subject to liens and such liens can be enforced without the joint action of the husband and wife. (*Palmer v. Lavigne*, 104 Cal. 30, 37 P. 775.)

Public Corporations.

Sec. 123. The state is not bound by the general words of a statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it.

This is the rule of statutory construction and it is misleading to say that this construction is adopted on the ground of public policy. The import of the language is not limited because it would be against public policy to give to the words their natural effect, but because, in view of familiar rules of construction, a different intent is manifested in the language used.

The government was created and shaped by the constitution. It is not an end in itself, but a mere instrumentality

for public service. Its powers and functions exist only for the people. One of its functions is to enact laws for the government of the inhabitants within its limits, thereby affording them protection and advancing their general welfare. The property it holds is simply to enable it to perform the service required of it. It is as much devoted to public use as are the streets and highways, though in a different way; and it is generally held by a different tenure.

Instead of being the natural and obvious conclusion that a general law, providing remedies for private individuals, was intended to enable a creditor of the state to seize this property for the satisfaction of his debt, it would be a most unnatural inference.

The constitution has itself provided, as the only means which the state has for the payment of its debts, the exercise of the sovereign power of taxation. And for each political subdivision the rule is the same. These revenues are divided into specific funds, and one furnishing labor or materials to the state knows to what he must look for payment. He becomes a creditor of a specific fund, and has no rights except with reference to such fund.

The law conferring the right to a mechanic's lien implies a right of action to enforce it. One cannot sue the state, unless expressly authorized by statute, and this principle is embodied in our constitution. General statutes creating new remedies for individuals have never been held to authorize such suits.

Under the constitution and laws of this state regulating mechanic's liens, therefore, no public property or public building is subject to a mechanic's lien, and none can be enforced against a school house erected by a public school district. (*Mayrhofer v. Board of Education*, 89 Cal. 110, 26 P. 646.)

A monument erected upon and used as an adornment of one of the public parks of a municipality, and which is affixed to the freehold, becomes a part of the land, and is the property of the municipality, and cannot be made the

subject of a lien for labor or materials, though built by private contribution. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487.)

In *Bates v. Santa Barbara County*, 90 Cal. 543, 27 P. 438, the defendant erected a hall of records upon a public block which was to be used by the defendant county for public purposes, and it was held that a mechanic's lien for work and materials could not be enforced against such building. But it was further held that where a materialman or mechanic who had furnished materials to or had done work for a contractor in the erection of such building, gives written notice to the county (owner), of his claim under section 1184 of the C.C.P., the lien-claimant acquires, as against the contractor, a prior right of payment of his claim from the unpaid portion of the contract price, and that this right as against the contractor did not depend upon the legality of the building contract or upon the right to acquire a lien. (Sub. 15, sec. 690, of the C.C.P., expressly exempts public buildings and property from execution.)

Mining claims. What is a mining claim within the meaning of the lien law.

Sec. 124. Section 1183 of the C.C.P., with reference to mining claims, provides:

"And any person who performs labor in any mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the work or labor done, or materials furnished by each respectively," etc.

The right to a lien upon a mining claim differs in no respect from the right to a lien upon the other property mentioned in section 1183. This branch of the subject does not, therefore, require special consideration. (1)

(1) The amendment of 1885 to section 1183 which struck out the words "mining claim" before the word "building," (see note 3 to sec. 1, chap. I, *supra*) has raised doubt whether, as that section now stands, materialmen are entitled to liens for materials furnished for mining

There is one matter, however, involved in it which requires presentation. What is a mining claim?

The term "mining claim" has always been applied to a portion of mineral lands to which the right of exclusive possession and enjoyment by private persons has been asserted by actual occupation, or by compliance with local mining laws, rules, customs or usages. Land, the title to which is held under a Spanish or Mexican grant, although mineral in character, is not a mining claim within the meaning of section 1183. (*Williams v. Santa Clara M. Asso.*, 66 Cal. 193, 5 P. 85.)

The words "mining claim" in the statute include "mining ground" and all "mines" whether the title thereto is inchoate or perfect. But the lien will not extend to adjacent land which is not mineral in character; though the inclusion of non-mineral land in the notice of lien will not vitiate it, if any part of the land is a mine, the court having the power to adjust the rights of the parties by its decree. (*Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

At page 372 the court say:

"The decision in *Williams v. Santa Clara M. Asso.*, *supra*, is not in conflict with this. Although there are some expressions in the opinion in that case which seem to countenance the opposite view, we think that what was decided was merely that the adjacent land which the defendant held under a Spanish grant, was not mineral land, or appurtenant thereto. Such land was, therefore, not a mine or a mining claim in any sense, and, consequently, was not liable as such."

claims. It will be observed that a lien is now expressly given upon mining claims for labor performed, but that there is now no such express provision with reference to materials furnished. (See sec. 266, *infra*.) Section 1187 of the C.C.P. also expressly provides for the time of filing a claim of lien for labor performed upon or in a mining claim, but does not provide for a claim for materials furnished therefor. The reason for these express and special provisions with reference to labor and for the absence of like provisions with reference to materials, is not clear. The only explanation that suggests itself is that the legislature, by the amendment referred to, intended to deny to materialmen the right to liens on mining claims.

Mining claims, continued.

Sec. 125. Land held under an agricultural patent from the United States is not subject to a lien for the wages of laborers employed in working a mine upon it. Such land is not a mining claim within the meaning of section 1183 of the C.C.P. (*Morse v. De Ardo*, 107 Cal. 622, 40 P. 1018.)

The court at page 625, say:

"In *Bewick v. Muir*, *supra*, which respondent contends modifies and explains the law declared in *Williams v. Santa Clara M. Asso.*, *supra*, this court was called upon to decide whether the phrase 'mining claim' of the lien law included mining claims after the possessory right or claim had matured into a perfect title by the issuance of a mineral patent from the United States; and this was all it was called upon to decide. This court said: 'The words *mining claim* as used in the law, have no reference to the different stages in the acquisition of the government title. In our opinion it includes all mines, whether the title is inchoate, as in the case of a mining claim, in its strict sense, or perfect, as in the case of a fee-simple title.' Reference to the record in this last-named case discloses not only that the complaint pleaded that all the mining land and ground described therein were mining claims, but that the court in its findings so declared. In the case at bar there is no such finding.

"It follows, therefore, that the further expressions of the court in *Bewick v. Muir*, *supra*, were not only unnecessary to the decision, but were addressed to a condition neither involved in nor presented by the facts of the case * * * . We must turn, therefore, to *Williams v. Santa Clara M. Asso.*, [sec. 124, *supra*,] as containing the last authoritative expression of the court upon the question, and we deem its reasoning to be unsailable and its conclusions determinative of the case at bar."

Mining claims severally located on the same ledge and consolidated in one mining company and worked by it as one mine, may, for the purposes of the lien law, be regarded and treated as a single claim and declared on as such. (*Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 P. 378.)

Area of land subject to lien. The statute.

Sec. 126. Section 1185 of the C. C. P., provides:

"The land upon which any building, improvement [99] well [99], or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, [73-4] to be determined by the court on rendering judgment [73-4], is also subject to the lien," etc. (See sec. 3, *supra*, for sec. 1185 in full, amendments thereto, notes thereon, and explanation of figures and brackets.)

Section 6 of the lien act of 1850 (stats. 1850, 511; 1850-3, 808) provided that "The land upon which any building shall be erected, together with the space around the same not exceeding five hundred square feet, clear of the building, shall also be subject to the above lien," etc.

Section 4 of the lien act of 1856 (stat. 1856, 204) struck out the provision in the former statute with reference to "five hundred square feet" and substituted therefor,— "together with a convenient space around the same, or so much as may be required for the convenient use and occupation of the premises."

Subsequent enactments of the lien law and the amendments thereto have left the provisions just quoted, with reference to the area of land which could be subjected to liens, in substantially the same language in which it is now found in section 1185 of the C.C.P.

What is convenient space of land about the building.

Sec. 127. The land upon which the building or other structure or improvement is constructed is necessarily subject to liens and they cover the owner's estate in the land whatever it may be. (*Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932; *Sachse v. Auburn*, 95 Cal. 650, 30 P. 800; *Willamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633; S. C. 24 P. 1026.)

But if the lien claimant would claim more land than that covered by the building or other structure or improvement, he must make proper averments in his complaint and obtain the determination of the court in the judgment foreclosing his lien not only that a convenient space is required for the use and occupation of the building but also the extent of the additional land thus required. This branch of the subject belongs more properly to the chapter upon Pleading and Practice and to those sections of that chapter which treat of the complaint, findings and judgment. (See secs. 396, 440, 447, *infra*.)

The question here is, What is a convenient space of land about the building?

Section 1185 of the C.C.P. should be construed to mean such space or area of land as is necessary to the enjoyment of the building, etc., keeping in view the purpose for which it has been constructed. The uses to which the building is to be put must manifestly, many times, determine the quantity of land necessary to the convenient use and occupation thereof. If erected as a mill for sawing lumber, the space required for a log and lumber yard would be regarded as necessary to its use, while like space around a similar building for a watch factory might not be at all necessary. This thing should be borne in mind,—it is for the *convenient use and occupation* of the building that the land about the same is given by our statute. A flouring mill erected upon a large grain ranch would require a given space around it for the purposes incidental to its operations;

it might require the whole ranch to create business for it, but it would not follow, under our statute, that the entire ranch would be subject to a lien for its erection.

Upon such reasoning it was held that a race track covering about sixty acres of ground, with its training stables, grandstand, corrals, and other improvements belonging to an Agricultural Park Association, and situated upon its fair grounds, was not necessary to the convenient use and occupation of a building erected for a hotel, clubhouse and saloon upon such fair grounds tract, and could not be made subject to a lien for the erection of such building. (*Tunis v. Lakeport A. P. Asso.*, 98 Cal. 285, 33 P. 63, 447.)

At page 287, the court say:

"In the present case it is easy to see that the race-track with its training stables, grandstand, corrals and other improvements, may be necessary to create business for the hotel, clubhouse and saloon, for which the building in question was constructed, but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes except as they tend to bring custom to its doors."

The same rule applies to a dwelling-house. The statute does not contemplate that sufficient land around the house to support the owner while living there, should be set apart, and it is error for the court to set apart forty acres of land around a dwelling-house as being required for the convenient use and occupation thereof. (*Cowan v. Griffith*, 108 Cal. 224, 41 P. 42.)

In *Thompson and Boyle Co. v. Waite*, (Superior Court L. A. Co., 1900, Judge Trask,) a well had been constructed for the purpose of pumping water with which to irrigate some twenty acres of farm lands. Judgment was rendered in favor of the plaintiff, a materialman, for the foreclosure of its lien upon the well, and the question arose as to the area of land necessary "for the convenient use and occupation" of the well. It was held that the statute did not authorize the

court to subject the whole ranch to the lien and it was accordingly decreed that plaintiff should have a lien upon such area of land about the well as would be required for the operation of the well and a right of way through the farm from the well to the public highway.

Area of land covered by lien. Mining claim.

Sec. 128. Section 1183 of the C.C.P. provides that any person who performs labor in any mining claim or claims, has a lien upon the same. It will be observed that the lien is not given upon the "mine," but upon the "mining claim." Strictly speaking a "mining claim" cannot be constructed, altered or repaired as provided in the statute. The intention of the law makers, therefore, seems to have been to give a lien upon the whole mining claim for work done on, and for materials furnished for and used in, any mining claim, or any building, or other structure or improvement, constructed in or upon the mining claim.

One who, therefore, performs labor in any pit, shaft, or gallery of a mine, is entitled to a lien on the whole mining claim. (*Helm v. Chapman*, 66 Cal. 291, 5 P. 352; *Williams v. Mining Co.*, 102 Cal. 134, 140, 34 P. 702, 36 P. 388.)

The whole mining claim being subject to a lien, one who furnishes material to be used, and which is used, in repairing the improvements of several separate structures on a mining claim, is entitled to a lien upon the whole, and is not limited to the separate structures on which the repairs are made. (*Silvester v. Coe Quartz M. Co.*, 80 Cal. 510, 22 P. 217; *Williams v. Mining Co.*, *supra*)

But the lien will not extend to land not mineral in character. (*Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

CHAPTER VII.

PERSONS WHO MAY SUBJECT PROPERTY TO LIEN.

Section.		Section.	
129	THE STATUTE. SECTION 1183.	134	Agency and authority of agent to subject property of principal to lien.
130	LEGISLATIVE POWER TO CHARGE PROPERTY WITH LIENS. FOUNDATION OF RIGHT TO LIEN.	135	General law of agency.
131	CONTRACT OF OWNER BASIS OF RIGHT TO LIEN.	136	Contract by agent as basis of right to lien against property of his principal.
132	Contract the price of which does not exceed \$1000.	137	CONTRACT RAISED BY THE LIEN LAW.
133	Who is "owner" within meaning of sections 1183 and 1185 C. C. P.	138	The same. The decisions.
		139	The same. Power of Legislature in the premises.
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		141	INCOMPETENT PERSONS. GUARDIANS.

Persons who may subject property to lien. The statute.

Sec. 129. Section 1183 of the C.C.P. provides that the persons therein named performing labor and furnishing materials, etc., shall have liens upon the property upon which they have bestowed labor or for which they have furnished materials, for the value of the labor done and materials furnished, "[85] whether at the instance of the owner or of any other person acting by his authority, or under him, as contractor or otherwise; and any person who performs labor in a mining claim or claims, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, for the

work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, [87] addition to [87], or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter." [85.]

(That part of section 1183 above quoted was introduced into it by the amendment of 1885 (Stat. 1885, 143). See chap. I, sec. 1, *supra*, for section 1183 in full, amendments thereto, notes thereon and explanation of figures and brackets.)

Legislative power to charge property with lien. Foundation of right to lien.

Sec. 130. The lien of the mechanic is not based upon the statute. (*Dore v. Sellers*, 27 Cal. 594; *Davis v. Livingston*, 29 Cal. 291.) Yet the lien is a statutory creation, (*Spinney v. Griffith*, 98 Cal. 153, 32 P. 974; sec. 24, *supra*), since the statute alone gives the right to it.

It is not an obligation, but a mere incident to an obligation. It is not a right which in itself is enforceable; it is rather a remedy provided by law, by which priority of payment of the debts of laborers and others for their labor and materials is secured, and by which payment thereof may be enforced, when the right to a lien under the statute has been perfected, by foreclosing the lien.

The right to a mechanic's lien depends, therefore, for its existence, upon the statute creating it, but the foundation of the lien is an obligation, or, to be more specific, an obligatory contract (*Fish v. McCarthy*, 96 Cal. 484, 31 P. 529), while the right to enforce it depends upon the performance of labor, or the furnishing of materials in pursuance of, and under and in accordance with, the terms of such con-

tract, and also in substantial conformity with the requirements of the statute. (*Morris v. Wilson*, 97 Cal. 644, 32 P. 801. This statement excludes estoppel under section 1192 of the C.C.P. for which see sec. 140, *infra*.)

It is a fundamental rule of property that no person can be disturbed in the possession, or in the enjoyment, of his property, nor can it be taken from him, without his consent. (*Bowen v. Aubrey*, 22 Cal. 566, 571; *Latson v. Nelson*, 11 Pac. C. L. J. 589; concurring opinion of Fox, J., *Kellogg v. Howes*, 81 Cal. 170, 181, 22 P. 509.) The legislative power may impose reasonable restrictions upon the use of his property, may prescribe the form and mode by which, and the conditions upon which, the title to it may be conveyed or charged, and limit the power of disposition of it by last will and testament; but the sole power and authority to convey and charge his property reside in its owner.

Mechanics' liens are no exception to these limitations upon legislative power over private property. The legislature may declare the conditions of ownership of property under which that property shall be charged with mechanics' liens, but it cannot directly charge the property with such liens. It is from this standpoint of fundamental law that statutes giving liens to mechanics and others proceed. (*Hicks v. Murray*, 43 Cal. 515; *Fuquay v. Stickney*, 41 Cal. 583; *Santa Cruz etc. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097; *Latson v. Nelson*, *supra*; see *Lambert v. Davis*, 116 Cal. 292, 48 P. 123. Of course this statement excludes the sovereign power of the state in matters of taxation as well as the right to take property under the power of eminent domain.)

Turning to the lien law of the state, it will be found that the legislature, in its enactment, has strictly observed the rules laid down.

Sections 1183, 1184, 1191, 1192 and 1202 of this law are the only statutory provisions which give rights to liens. An analysis of these sections, therefore, must, as it will show the persons who may legally subject property to such liens.

It will give clearness to the subject under consideration to anticipate its discussion in the subsequent sections of this chapter, by here stating that the only person who can subject his property to the liens of mechanics and others, under the lien law of this state, is the owner himself. He may do this, however, either (1) by his own contract, or (2) by that of his agent; (3) by the contract raised for him by the statute; or (4) by his conduct which brings him within the rule of equitable estoppel. A violation of the provisions of the lien law by the owner, in certain cases, has the effect of subjecting his property to liens. In the classification above given, these cases might properly have been called "penalties," but the language of the statute and of the decisions warrants the use of the expression "contract raised by the statute." (See secs. 137, 138, *infra*.)

These subjects will be presented in the order named.

Contract of owner basis of right to lien.

Sec. 131. Under the provisions of section 1183, the owner is the only person who has authority to subject his property to liens. This is the express language of that section. It provides that the persons therein named performing the labor and furnishing the materials therein stated, shall have liens whether such work was done and materials were furnished "at the instance of the owner or of any other person acting by his authority, or under him as contractor or otherwise."

Another provision of the same section is that the contractor and the other persons therein named "having charge of any mining or of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter."

The fact that this section gives liens in cases where the work is done and the materials are furnished at the instance

of the agent of the owner, does not have the effect to make the contract, under which the work was done and the materials were furnished, the individual contract of the agent. The language of the section is that the persons named shall have liens whether the work was done and the materials were furnished "at the instance of the owner or of any other person *acting by his authority*, or under him as contractor or otherwise."

By this section, the contract which is made the basis of the right to a lien, is the contract of the owner, or of his authorized agent, and since in law, the contract of an authorized agent, is the contract of the principal, in law, therefore, the contract which is made the basis of the right to a lien is the contract of the owner and of no other person.

The same section provides (as above stated) that certain persons who have charge of the building or other improvement, "shall be held to be the agent of the owner for the purposes of this chapter."

This provision, as will be shown later on (sec. 135, *infra*), establishes a mere rule of evidence, and where, as a matter of fact, such person is acting without the authority of the owner, there is no contractual relation between the persons employed by such person in charge and the owner, and in the absence of the elements of estoppel there is no foundation for the right to claim liens against the property, or any estate therein, of the owner. (Donohoe v. Trinity etc. Co., 113 Cal. 119, 45 P. 259; Eaton v. Rocca, 75 Cal. 97, 16 P. 529; Santa Cruz etc. Co. v. Lyons, 117 Cal. 212, 48 P. 1097; Fish v. McCarthy, 96 Cal. 484, 31 P. 529; Jurgensen v. Diller, 114 Cal. 491, 46 P. 610; Fresno etc. Bank v. Husted, 49 P. 195.)

Section 1191, (chap. I, sec. 9, *supra*, of the C.C.P.) which gives a lien to any person "who, at the request of the reputed owner of any lot," etc., grades, or improves the same, or who constructs any improvements in connection

therewith, makes the contract between the reputed owner and the person making the improvement the foundation for his right to a lien.

Under this section, as under section 1183, the interest or estate of the real owner, in the lot, or in the land, is not subject to a lien by virtue of a contract entered into with one who is only the reputed owner of the land. (*Santa Cruz etc. Co. v. Lyons, supra.*)

Contract of owner basis of right to lien. Contract the price of which does not exceed \$1000.

Sec. 132. The statute does not require every contract to conform to the provisions of sections 1183 and 1184 with reference to formalities and stipulations as to price, in order to be valid and enforceable. Contracts, the price of which does not exceed one thousand dollars are exempted from the provisions of those sections. (See secs 146, 167, *infra.*) The statute, under these contracts, however, gives liens to the persons named in section 1183 for their labor and materials. The contract price of such contracts is not expressly made a lien upon the property of the contracting-owner. The difference between the two classes of contracts is unimportant. In either case the object is accomplished by giving the right to liens.

The last case stated, that of contracts the price of which does not exceed one thousand dollars, does not, in respect of the power of the legislature to subject property to liens, differ from those where the contract price exceeds one thousand dollars. In either case, the contract of the contracting-owner is the foundation of the right to the liens given by the statute.

The contract of the "owner" being a foundation of the right to liens against his property, it thus becomes pertinent to enquire (1) who is "owner" within the meaning of section 1183; (2) the competency of such "owner" to make contracts; and (3)—since the statute makes certain persons, the agent of the owner—who is "agent" within the meaning of sections 1183 and 1185, and the authority of such agent to subject the property of his principal to liens.

Who is owner within meaning of sections 1183 and 1185.

Sec. 133. The term "owner" as used in sections 1183 and 1185, does not necessarily mean the owner of the fee-simple estate in the land. (See sec. 39, *supra*.) As we have shown in a former chapter (chap. VI, sec. 102, *supra*), a person otherwise competent, who has any interest or estate in land, may subject that interest, or estate, to liens. To take a particular case, a lessee for a term of years in possession, erects a building thereon, and employs laborers, and contracts with materialmen, for the construction of a building upon the leased land. In such case, it is clear that the lessee is the "owner" within the meaning of section 1183, and that under such contracts his interest only in the land is subject to liens for such labor and materials. (West Coast L. Co. v. Newkirk, 80 Cal. 275, 279, 22 P. 231; Johnston v. Dewey, 36 Cal. 623.)

Any other construction of this section would lead not only to absurd results, but would in many cases, entirely defeat the rights of laborers and materialmen and others to liens upon the land or upon any estate therein: for, if the lessor, under this construction, has no knowledge of the construction or intended construction of the building, or, having such knowledge, gives notice by posting disclaiming responsibility, as provided in section 1192, no lien could attach to the land. The legislature never intended this result. On the contrary, it intended that any interest of the contracting-owner, in the land, which could be sold under execution sale, should be charged with liens to the extent of such interest. (West Coast L. Co. v. Newkirk, *supra*.)

The "owner," therefore, mentioned in sections 1183 and 1185 who has an estate or interest in the land less than a fee-simple, and for whom, by these sections, various and many agents have been created, must not be confounded with the reversioner who is also called "owner" in section 1192 of the same code. (See sec. 106, *supra*, as to who is

“owner” within section 1192.) They may be and they are, the same person when the latter is both the contracting-owner and the owner of the fee-simple title to the land, but they are different and distinct persons and “owners,” when, as we have seen, the contracting-owner has an estate less than a fee-simple.

The distinction here pointed out is important. Section 1183 creates agents for the contracting-owner and for no other person. In the case stated of the lessee, these persons are the agents of the contracting-lessee, and not of the lessor-owner, and no rights can grow out of such an agency against the lessor-owner which would entitle any person to lien upon the interest or estate of the lessor-owner in the land. (*Eaton v. Rocca*, 75 Cal. 93, 16 P. 529; *Santa Cruz etc. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097; *Johnston v. Dewey*, *supra*; *Fresno etc. Bank v. Husted*, 49 P. 195.)

By section 1183, therefore, the contracting-owner may subject the “property” upon which the laborers have bestowed their labor and for which the materialmen have furnished their materials, to their liens, and by virtue of section 1185, a certain amount of land about and upon which the building, etc., is constructed, is also subject to the liens, but under the provisions of those sections, the liens attach only to the interest or estate therein of the contracting-owner.

Agency and authority of agent to subject property of principal to lien.

Sec. 134. Section 1183, quoted at the beginning of this chapter, provides, *inter alia*, that any person acting by the authority of the owner, “or under him as contractor or otherwise;” “or his agent;” and every “contractor, subcontractor, architect, builder or other person having charge of any mining, or the construction * * * either in whole or in part, of any building or other improvement aforesaid, shall be held to be the agent of the owner for the purposes of this chapter.”

The provisions just quoted apply to all cases—to valid as well as to void contracts. (*Bates v. Santa Barbara*, 90 Cal. 543, 27 P. 438.)

This in part was but a re-enactment of the existing law relating to principal and agent. One person who acts under the authority of another is, by the general law, the agent of the latter. (Sec. 2295, Civil Code.)

The scope of section 1183 would seem, at first glance, however, to enlarge upon the general law of agency. It designates particular persons, and declares that they "shall be held to be the agents of the owner for the purposes of this chapter;" but an examination and comparison of the provisions of section 2300 of the Civil Code, with those of section 1183 of the C.C.P., lead to the conclusion that the difference, if any, between these two sections, is one of evidence only.

Section 2300 of the Civil Code declares, in effect, that any person who is not really employed by the principal, is his ostensible agent when the principal intentionally, or by want of ordinary care, causes a third person to believe him to be his agent. (See secs. 2330, 2334, Civil Code.) The language of section 1183 of the C.C.P. is "the contractor, subcontractor, builder, or other person having charge of any mining or the construction," etc., of any building, etc., "shall be held to be the agent of the owner for the purposes of this chapter."

The difference between the two sections is this: Section 2300 of the Civil Code defines an ostensible agent for all cases, and section 2334 of the same code makes the principal liable for the acts of his ostensible agent to such persons only "who have, in good faith, and without ordinary negligence, incurred a liability or parted with value, upon the faith thereof; whereas, section 1183 of the C.C.P. has defined who, in a particular case, shall be held to be an ostensible agent, and, in addition thereto, has declared what evidence shall amount to proof of the ostensible agency, to wit, having charge of any mining, building, etc.

To give to section 1183 any other construction would be to concede to the legislature the power to do indirectly that which it cannot do directly, namely, the power to make a contract for the owner through the instrumentality of an agent.

The legislature has not the power arbitrarily to create agents for third persons, but it has undoubted power to declare what shall, and what shall not, constitute agency, and to determine what evidence shall be sufficient proof of such agency. But even in these cases there is denied to the law-making power the authority to create such agency in cases where the principal has neither employed the agent, nor, by his conduct, laid the foundation for an ostensible agency, and has no knowledge or notice either of the agent or of the agency. (*Donohoe v. Trinity etc. Co.*, 113 Cal. 119, 45 P. 259; *Eaton v. Rocca*, 75 Cal. 97, 16 P. 529; *Santa Cruz etc. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097; *Fox, J.*, in *Kellogg v. Howes*, 81 Cal. 170, 181, 22 P. 509.)

Authority of agent to subject property of principal to lien. General law of agency.

Sec. 135. By the provisions of the Civil Code, agency is either actual or ostensible (sec. 2298.) Section 1183 of the C.C.P. recognizes this classification. It provides that certain persons shall have liens whether the labor was done and the materials were furnished "at the instance of the owner, or of any other person acting by his authority, or under him, as contractor or otherwise." In these cases there is a real employment of the agent by the principal, and they fall within the definition of actual agency. (C. C., sec. 2299.)

Another provision of section 1183 of the C.C.P. is that "every contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction," etc., of any building, etc., "shall be held to be the agent of the owner for the purposes of this chapter." In

these cases there may, or may not be a real employment of the agent by the principal, but if there is no real employment, they fall within the definition of an ostensible agency. (C. C. sec 2300; *Goss v. Helbing*, 77 Cal. 190, 19 P. 277.)

Subsequent sections of the Civil Code define the authority of the agent, whether actual or ostensible, and, also, the liabilities of the principal for the acts of such agent. It is foreign to the purpose of this chapter to enter into a discussion of the general law of agency. It is sufficient to point out that the agent and the agency mentioned in, and created by section 1183 of the C.C.P. fall within this general law, and must, except as modified by the express provisions of that section, be governed by that general law. The fact that section 1183 has declared who, under certain circumstances, shall be held to be the agent of the owner, neither adds to, nor subtracts from, the law applicable to agency in general. The provisions of section 1183 merely lay down rules of evidence by which the agency therein provided for may be proved, and the principal thus brought within the general law of agency and the provisions of the lien law. (See *Hooper v. Flood*, 54 Cal. 220; *Whittier v. Wilbur*, 48 Cal. 175.)

Contract of agent as foundation of right to lien against property of principal.

Sec. 136. Little remains to be said upon the authority of the agent to charge the property of his principal with liens. If the agency is established, the contract of the agent for labor and materials is, if within the scope of his authority, the contract of his principal, and by force of the statute itself, as well as by virtue of the existence of a binding contract of the owner, the laborer and materialman and others, are entitled to liens upon the property of the principal. (*Moore v. Jackson*, 49 Cal. 109; see *West Coast L. Co. v. Newkirk*, 80 Cal. 275, 279, 22 P. 231; *Goss v. Helbing*, 77 Cal. 190, 19 P. 277; *Munger & G. Co. v. Mullen*, Superior Court L. A. Co., 1897, Judge York.)

The agency raised by the statute, and the rights flowing therefrom, to subject the property of the owner to such liens, may be defeated by the owner (who is not the contracting-owner) upon his giving notice disclaiming responsibility as provided in section 1192 of the C.C.P. (*Eaton v. Rocca*, 75 Cal. 93, 16 P. 529.)

And the presumption raised by section 1183 in favor of one performing labor, that the person having charge of the property is the agent of the owner, may be rebutted; and one doing such work with knowledge that the person having charge of the property did not own the property and was not working it as the owner's representative, is not entitled to a lien thereon on any theory of his employer's agency. (*Jurgensen v. Diller*, 114 Cal. 491, 46 P. 610; see also *Ayers v. Green etc. Co.*, 116 Cal. 333, 48 P. 221; *Fresno etc. Bank v. Husted*, 49 P. 195; *Donohoe v. Mining Co.*, 113 Cal. 119, 45 P. 259.)

But a contract made by the authorized agent of the owner, is the contract of the owner, and the latter cannot, under section 1192, defeat the rights of laborers and others to liens upon his property. (*Moore v. Jackson*, *supra*, *Hooper v. Flood*, 54 Cal. 220; *McIntyre v. Trautner*, 63 Cal. 429, 431; *Goss v. Helbing*, *supra*; *Hines v. Miller*, 122 Cal. 517, 55 P. 401.)

Contract raised by lien law.

Sec. 137. If the contract is valid under section 1183 and in substantial conformity with section 1184 of the C.C.P., it is, as we have seen, the basis of the right to liens against the property of the contracting-owner.

(The provisions of these sections with reference to formalities and stipulations as to price, apply only to original contracts the price of which exceeds one thousand dollars. See secs. 146, 147, *infra*.)

If, however, the contract is void because the provisions of section 1183 have been violated, or, if the contract does not

conform substantially with the provisions of section 1184, the persons named in those sections are, nevertheless, entitled to liens, but the right to liens, in such cases, is based upon the clauses of those sections, substantially in the same language as follows:

"In such case [above stated], the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance [and request, sec. 1184] of the owner [of the person who contracted with the contractor, sec. 1184], and they shall have a lien for the value thereof."

Section 1202 of the C.C.P. also contains a provision declaring the contract "wholly void" if by conspiracy between the owner and the contractor, the contract shows the price less than it really is.

Where the contract, otherwise valid, conforms substantially with the provisions of section 1184, its price, or the balance thereof unpaid, is the limit of the amount for which liens can be enforced against the property of the contracting owner, and the original contractor is entitled to a lien for the balance of the contract price remaining due after deducting all claims of other parties for work and materials. (Sec. 1193 C.C.P.)

But, by the provisions of section 1184, where the contract is not in substantial conformity with that section, the amount of liens of all persons, except of the contractor, is limited only by the value of the work done and materials furnished, which may greatly exceed the contract price, or the balance thereof, unpaid.

Where, however, the contract whose price exceeds one thousand dollars, is not in writing, is not subscribed by the parties thereto, or is not, before the work is commenced, filed for record, as required by section 1183, it is "wholly void" and no recovery shall be had thereon by either party thereto."

Contract raised by lien law. Continued.

Sec. 138. In *Kellogg v. Howes*, 81 Cal. 170, 22 P. 509, the contract under consideration (an original contract, the price of which exceeded one thousand dollars), had not been filed for record. The contract was held to be "wholly void," and the point was made that, such being the case, there could be no recovery by a subcontractor against the owner.

The court, having under consideration the clause of section 1183 already quoted, at page 179, say:

"The point made that there can be no recovery by a subcontractor as against the owner, independent of some contract between the owner and original contractor, is met by the express language of the statute (sec. 1183) that, for the purpose of his lien, he shall be *deemed* to have contracted directly with the owner, and shall have a lien for the *value* of his material. This brings him in direct contact with the owner as a contractor, and removes the distinction made under former statutes between those who contract directly with the owner and subcontractors. By the terms of the statute they become, for the purposes of their lien, original contractors with the owner, but cannot recover against him personally." (Citing *Southern, etc. Co. v. Schmitt*, 74 Cal. 625, 16 P. 516; see *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860; *Lumber Co. v. Wooldredge*, 90 Cal. 574, 579, 27 P. 431; *Davis v. MacDonough*, 109 Cal. 547, 42 P. 450; *Kuhlman v. Burns*, 117 Cal. 469, 49 P. 585; sec. 81, *supra*.)

In the concurring opinion of Fox, J., (*Kellogg v. Howes*, *supra*, 180) it is said:

"But after negotiating the terms of the contract with Lane [contractor] which was never completed, and never became a valid contract, Howes [owner] permitted him to procure material and erect the building; in other words, permitted Lane to act as his agent in the construction of the building upon which these liens were filed. The statute expressly declares that in such cases the sub-contractor—the laborer and materialman—shall be *deemed*

to have contracted directly with the owner, and shall have a lien for the value of his material or labor. There is no constitutional objection to such a provision. The obligation most frequently assumed by all men engaged in business, and most frequently enforced by the courts, is an implied one to do the same thing—to pay the value of labor done or materials furnished at the request of the party receiving the benefit thereof, and it makes no difference whether the request was made by him in person, or through one whom he had held out to the world, or to the person furnishing the labor or material, as his agent in the premises."

Contract raised by lien law. Power of legislature in the premises.

Sec. 139. In *Kellogg v. Howes*, *supra*, the court had under consideration the right of laborers and materialmen to liens where, as in that case, the original contract was void because not filed for record, and in discussing the power of the legislature to give liens in such case, at page 177, said:

"But counsel say the legislature had no power to provide for any such liability on the part of the owner—[that is, the liability of the owner under that clause of section 1183 which provides that in case of void contracts, the work done and materials furnished shall be deemed to have been done and furnished at the personal instance of the owner and that laborers and materialmen shall have liens for the value thereof],—and that this court has so decided. We do not so understand it. It has been held, as we have said, and very properly, that *where there is a valid contract*, the owner cannot be compelled to pay more than he has contracted to pay, *unless he is notified* of the claims of subcontractors before payment to the contractor. But that is not this case. Here there was no contract. If the legislature had the power to say to the owner, 'If you pay the contractor after notice from the subcontractor of his claim, you shall still be liable to the latter,' it has the undoubted right to say to him,

'If you do not execute your contract in a certain form, and file it in the recorder's office, you shall be liable to materialmen and laborers for the value of their material and labor.' There is no hardship or injustice in this provision. The owner is only compelled to pay once for what he receives and retains the benefit of. He is not bound and has no right, as between him and subcontractors, to pay the contractor."

It may also be added that the owner in contracting for the construction of his building or other improvement, does so in the face of the lien law, and especially of those provisions of that law which make certain persons his agents for the purposes of the law and declare the conditions upon which his property may be charged with liens. In such case it will be conclusively presumed that the owner has consented that his property may be charged with liens in accordance with the provisions of the statute. (See *Smith v. Morse*, 2 Cal. 551; *Phillips on Mech. Liens*, [2nd Ed.] sec. 65.)

Estoppel.

Sec. 140. Section 1192 of the C.C.P. provides that every building or other improvement mentioned in section 1183 of the same code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or other person, and the interest owned or claimed shall be subject to any lien filed, unless such owner or other person, shall, within three days after he shall have obtained knowledge of the construction, etc., give the notice disclaiming responsibility therein provided for.

This section does not directly give a lien to any of the persons mentioned in section 1183. The effect of it, however, is to subject the land of the non-contracting owner, or his interest therein, to liens unless he gives the notice above stated.

This section was not designed to reach the property of the contracting-owner. It reaches and subjects to liens, the land of the non-contracting owner, or his interest therein, whether he has personally, or through his agent, contracted with the original contractor, and independently of the contract and agency raised by the statute.

The legislative authority for thus subjecting the land of the owner, or his interest therein, to liens is based upon the equitable doctrine of estoppel. (*Fuquay v. Stickney* 41 Cal. 583, 587.) It is a familiar rule in equity that where a land-owner stands by and knowingly and silently suffers credit to be given to another on the supposition that such other person owns the land which is to receive, and which does receive, the benefit of such credit, he, the real owner, cannot afterwards defeat a mechanic's lien by insisting that the land is his own. The principles of equity clearly estop him from so doing. (*Santa Cruz etc. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097; *Lumber Co. v. Apfield*, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231; *Avery v. Clark*, 87 Cal. 619, 628, 25 P. 919.)

In *Godeffroy v. Caldwell*, 2 Cal. 489, 492, the court, having under consideration the lien law of 1850, say:

"It is a well settled rule of all courts of equity that the owner of land who stands by and sees another sell it, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. In strict analogy to this rule, it is also a familiar principle, that one who knowingly and silently permits another to expend money upon land, under a mistaken impression that he has title, will not be permitted to set up his right."

Incompetent persons. Guardians.

Sec. 141. Contract being the foundation of a lien, it follows that no lien can arise for work done or materials furnished unless there is a valid contract. One of the requisites of a valid contract is competent parties. Minors (C. C.,

secs. 25, 33, 35), insane and incompetent persons and persons deprived of civil rights (Id. secs. 39, 38, 40, 1556) who are contracting-owners may, therefore, defeat the enforcement of liens against their property. A building contract made with such persons is not binding upon them. (*Fish v. McCarthy*, 96 Cal. 484, 31 P. 529.)

Upon the same principle a guardian of a minor cannot subject the estate and property of his ward to such lien arising from work done and materials furnished under a contract for the erection or repair of a building which is the property of the ward, without first obtaining an order of the court authorizing the making of the contract. (*Guy v. DuPrey*, 16 Cal. 196; *Fish v. McCarthy*, *supra*, see also *Schwartzenberg v. Gross*, cited sec. 105, *supra*.)

An executor has no authority to subject the estate of the deceased owner to a lien for work and materials, nor can a suit against the executor be maintained to foreclose the lien therefor. The demand for such labor and materials must be presented as a claim in the usual manner and be allowed by the probate court. (*Holbrook v. Hasson*, Superior Court L. A. Co., 1896, Judge Noyes; *Booth v. Pendola*, 88 Cal. 36, 25 P. 1101; S. C. 23 P. 200, 24 P. 714.)

CHAPTER VIII.

THE CONTRACT.

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The statute. Section 1183.

Sec. 142. Section 1183, *inter alia*, provides:

[86] * * * *"In case of a contract for the work between the [87] reputed [87] owner and his contractor, the lien shall extend to the entire contract price * * * All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto and [87] the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due*

and payable [87], shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar, for such filing: otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and, in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof" [85].

That part of section 1183 in italics above quoted was added by the amendment of 1885 (stat. 1885, 143), and that part not in italics and between the figures [87] in brackets, was added by the amendment of 1887 (stat. 1887, 152.) See chap. I, sec. 1 for section 1183 in full, amendments thereto, notes thereon, and explanation of figures and brackets.

Comments on section 1183. Code contract foundation of lien.

Sec. 143. It will be observed that section 1183, a part of which has been quoted in the next preceding section, and all the other sections of the lien law, are silent as to those essentials which, in the general law of contracts, are deemed necessary to their validity. For instance, nothing is said in the lien law with reference to the competency of the parties to the contract, of their consent thereto, or of the consideration thereof. All these matters are left, therefore, to the general law of contracts.

The same.

Sec. 144. Our statute concerning mechanics' liens has taken the common-law, or code contract and made it the basis of the right of the mechanic to a lien for his work and materials upon the property of the contracting-owner. It is to this contract (Civil Code, sec. 1549, *et seq.*), that we must look to find the contract mentioned in the statute. (*La Grill v. Mallard*, 90 Cal. 373, 375, 27 P. 294.)

The subject of persons who may subject property to liens has been treated in a former chapter (chap. VII.) It is deemed unnecessary to treat of the other essentials of the Civil Code contract. It is sufficient for our purpose to say that every building contract, to be valid, must have these essentials, and refer those investigating this branch of the law to special works upon contracts.

Assuming, as do sections 1183 and 1184, the existence of a valid building code contract, it is proposed, in this chapter, to consider those essentials which have been added to it by these two sections of the lien law.

Statutory essentials of contract.

Sec. 145. Section 1183, *inter alia*, provides:

[85] * * * "All such contracts [between the reputed owner and his contractor],

(1) shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and

(2) shall be subscribed by the parties thereto, and

(3) [87] the said contract, or a memorandum thereof, setting forth,

(a) the names of the parties to the contract,

(b) a description of the property to be affected thereby,

(c) together with a statement of the general character of the work to be done,

(d) the total amount to be paid thereunder, and the

(e) amounts of all partial payments,

(f) together with the times when such payments shall be due and payable [87],

(4) shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing;

(5) otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto," etc. [85].

See note to section 142 of this chapter, *supra*. For section 1183 in full, amendments thereto, notes thereon, and explanation of figures and brackets, see section 1, *supra*.

Scope of statute.

Sec. 146. The provisions of section 1183 (quoted in the next preceding section), are intended to apply to original contracts only, or, as the statute says, to contracts "between the reputed owner and his contractor," the price of which exceeds one thousand dollars. (*Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932.) The test, therefore, in every case, by which to determine whether a particular building contract whose price exceeds one thousand dollars, is within these provisions, is to ascertain whether it is an original contract.

Every contract which is made between the "reputed owner and his contractor" is not necessarily an original contract. A person who contracts directly with the owner, may or may not be an original contractor. His status depends upon the facts of his particular case.

The subject of who are, and who are not, original contractors has already been discussed in a preceding chapter (chap. III), and need not be repeated here. It is sufficient to say that original contracts only must conform to the requirements of section 1183. (*Dennison v. Burrell*, 119 Cal. 180, 51 P. 1; *Reed v. Norton*, 90 Cal. 590, 27 P. 426; *Santa Monica L. Co. v. Hege*, 119 Cal. 376, 51 P. 555; *Bryson v. McCone*, 121 Cal. 153, 53 P. 637; *Kuhlman v. Burns*, 117 Cal. 469, 49 P. 585.)

The essentials of valid original contract under section 1183.

Sec. 147. Section 1183 declares the original contract, the price of which exceeds one thousand dollars, wholly void if the provisions of the statute are not complied with. It thus becomes pertinent to enquire what those essential requirements are.

The statute (sec. 1183) itself specifies them. Such contract (1) must be in writing, (2) subscribed by the parties

to it, and (3) the said contract (or a memorandum thereof setting forth certain matters contained in the contract) must be filed, etc.

Section 1202 also makes the "written contract filed" wholly void if the contractor and the owner conspire or agree that the contract price shall appear in the contract less than it really is. (For sec. 1202, see sec. 20, *supra*.)

These are the only requirements the non-observance of which renders the contract "wholly void." (San Diego L. Co. v. Wooldredge, 90 Cal. 574, 27 P. 431; Yancy v. Norton, 94 Cal. 558, 29 P. 1111.)

The same. Description of property.

Sec. 148. Section 1183 permits a memorandum of the contract to be filed as a substitute for the filing of the original contract. If, therefore, the original contract is not filed with the recorder, a memorandum thereof must be filed as a substitute therefor in order to preserve the validity of the contract. And it follows, of course, that if the memorandum filed does not meet the requirements of this section, the contract is rendered "wholly void."

Section 1183 states the several matters which the memorandum shall set forth and among these is the description of the property to be affected by the contract. It is not necessary to the validity of the contract, under this section, to set forth in it, any of the matters required to be stated in the memorandum of the contract. A contract, therefore, which fails to set forth a description of the property to be affected thereby is not rendered "wholly void." It was so held in San Diego L. Co. v. Wooldredge and Yancy v. Norton, sec. 147, *supra*.

Contracts required to be in writing.

Sec. 149. Section 1183, just quoted, provides, *inter alia*, that "All such contracts must be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars," etc.

The contracts here referred to are those made between the "reputed owner and his contractor" mentioned in the next preceding sentence of the same section. (*Hinckley v. Field Biscuit etc., Co.*, 91 Cal. 138, 27 P. 594,) and to such of those contracts only "when the price agreed to be paid thereunder exceeds one thousand dollars."

Therefore, to bring a contract within the provisions of section 1183 quoted above, two facts must exist, namely: A contract between the reputed owner and his contractor, that is, an original contract, and a contract the price of which exceeds one thousand dollars.

It follows that a contract the price of which does not exceed one thousand dollars is not, in any case, required to be in writing. (*Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932; *Lumber Co. v. Cummings*, 86 Cal. 23, 24 P. 814.)

It also follows that a contract, whether or not its price exceeds one thousand dollars, is not required to be in writing when it is made between persons other than the "reputed owner and his contractor," that is to say, when the contract is not an original contract within the meaning of the lien law. (See secs. 44-53, *supra*, as to what are original contracts.)

Therefore, the contract of a mere subcontractor and materialman is not required to be in writing although its price exceeds one thousand dollars. (*Reed v. Norton*, 90 Cal. 590, 27 P. 426.)

In the last case, the court, at page 599, say:

"Mitchell was a mere subcontractor and materialman, and there is nothing in section 1183 of the C.C.P. requiring a contract of the kind he had to be in writing or recorded; and even if the contract between Norton (owner) and Helm (contractor) had been void, there was no necessity for Mitchell to have had any written contract or to have recorded it."

Contracts required to be in writing, continued.

Sec. 150. Nor, need the contract of persons employed by the owner of a factory in process of erection to manufacture at their own shop, a steam plant, consisting of boiler, engine, feed-pipes and necessary attachments, and to deliver it and put it in place in the building for an agreed price exceeding one thousand dollars, be in writing; such persons are materialmen and are, therefore, not within the provisions of sections 1183 and 1184 relating to contracts between the owner of the building and his contractor. (*Hinckley v. Field Biscuit etc. Co.*, 91 Cal. 136, 27 P. 594; *Santa Monica L. Co. v. Hege*, 119 Cal. 376, 51 P. 555; *Bryson v. McCone*, 121 Cal. 153, 53 P. 637.)

So where a materialman contracts directly with the owner to furnish material to be used in the construction of a building which is being erected by the latter, such contract, whatever its price, is not required to be in writing. (*Sparks v. Butte etc. Co.*, 55 Cal. 389; *Schwartz v. Knight*, 74 Cal. 432, 16 P. 235; *Barber v. Reynolds*, 33 Cal. 497, s. c. 44 Cal. 579.)

And the same rule applies to the contract of a laborer for his individual labor. (*Barber v. Reynolds*, *supra*; see, secs. 60, 63, *supra*.)

A contract to perform labor and furnish materials for a sidewalk under section 1191 of the C.C.P., the price of which exceeds one thousand dollars, is not required to be in writing. Such contract may be oral and section 1183 requiring contracts the price of which exceeds one thousand dollars to be in writing, has no application. (*Kruezerberger v. Wingfield*, 96 Cal. 251, 31 P. 109.)

A contract for extra work, or for extension of time, under a building contract, is not required to be in writing: (*Barilari v. Ferrea*, 59 Cal. 1; *White v. Soto*, 82 Cal. 654, 23 P. 210.)

An implied contract between the owner and his contractor, the price of which exceeds one thousand

dollars, is, if not in writing, wholly void; but when such implied contract has been performed, the contractor may maintain an action for the reasonable value of the work done and materials furnished, and, though the contractor is not entitled to a lien thereunder, it is no defense to such action that the implied contract was not in writing and filed for record in accordance with the statute. (*Rebman v. San Gabriel etc. Co.*, 95 Cal. 390, 30 P. 564.)

Contracts within statute of frauds.

Sec. 151. The contract, however, in every case must meet the requirements of the statute of frauds. (C. C. secs, 1624, 1739, 1741.)

But a contract to furnish materials and fashion them according to specifications furnished by the purchaser, or according to some model selected, and when, without the special contract entered into by the parties, the thing furnished would never have been put in the particular shape or condition in which it is furnished, the contract is essentially one for labor, and is not within the statute of frauds. (*Flynn v. Dougherty*, 91 Cal. 669, 27 P. 1080; see *Clay v. Walton*, 9 Cal. 328 as to collateral promise of owner to pay for bricks furnished to contractor.)

A parol promise to pay for improvements upon land is not within the statute of frauds. (*Godeffroy v. Caldwell*, 2 Cal. 489; collateral promise, *Ellison v. Jackson Water Co.* 12 Cal. 543.)

The contract must be subscribed by the parties thereto.

Sec. 152. Section 1183, *inter alia*, provides that "all such contracts * * * shall be subscribed by the parties thereto * * *"

The contracts referred to, it is necessary to repeat, are those between the reputed owner and his contractor, that is,

original contracts, the price of which exceeds one thousand dollars. What has been said in preceding sections with reference to the essential that such contracts must be in writing, is applicable here; for, it is contracts in writing only and necessarily which the statute requires to be subscribed by the parties thereto.

Section 1183 (see sec. 142, *supra*) refers to contracts between the "reputed owner and his contractor." It is not necessary, therefore, to the validity of the contract that it shall be signed by the real owner. (*Dunlop v. Kennedy*, 34 P. 92, overruled in s. c., 102 Cal. 443, but not on this point.) But if such contract is not executed by the real owner he is not personally liable thereon, nor is his property chargeable with liens thereby. (*Santa Cruz etc. Co. v. Lyons*, 117 Cal. 212, 48 P. 1097.)

The word "subscribe," when applied to the signature to an instrument in writing usually means the writing of one's name beneath or at the end of the instrument. (24 Am. and Eng. Ency. of Law, 325, 1st ed.)

The word, as here used, undoubtedly has a signification analogous to its meaning as used in section 1276 of the Civil Code which prescribes the formalities of the execution of a will.

In re Walker's Estate, 110 Cal. 387, 42 P. 815, the court, having under consideration section 1276, say:

"To subscribe is to attest or give consent, or evidence knowledge by underwriting, usually (but not necessarily) the name of the subscriber. But the place of the writing is immaterial since a still more general meaning of the word 'subscribe' is to attest by writing, in which definition the locality is wholly disregarded."

Section 1624 of the Civil Code requires certain contracts, to be valid, to be in writing and subscribed by the party to be charged, etc.

In *California Canneries Co. v. Scatena*, 117 Cal. 447, the only signature to a memorandum of sale of peaches was

that written across its face by the seller, and it was held that the memorandum was "subscribed" within the intent of section 1624, *supra*. The court lay down the broad rule that under this section the memorandum need not be signed or subscribed at the end thereof; that it is sufficient if the party to be charged attaches his signature to it with the intent to accept and be bound by it, no matter to what part of the instrument the signature be attached.

The same. Plans and specifications. Memorandum of contract.

Sec. 153. Where a contract refers to plans and specifications according to which, by the terms of the contract, the work is to be done, such plans and specifications are an essential part of the contract, and, where reference is made to them in the contract as attached, when in fact they are not so attached (and the plans and specifications are not signed by the parties), there is not such a contract in writing and subscribed by the parties, as is required by the statute. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; *Worden v. Hammond*, 37 Cal. 61.)

In *Worden v. Hammond*, *supra*, the court, at page 64, say:

"It is not indispensable that the specifications be signed by the party to be charged [under sec. 2 of lien act of 1862, 384], but it will be sufficient if they be referred to with certainty. But where the reference is false, it cannot be helped out by oral evidence."

A building contract reciting that the material was to be furnished and the work done in accordance with drawings and specifications "identified by the signatures of the parties" thereto, is incomplete and invalid, if no such signed drawings and specifications are to be found. In such case the whole contract is not reduced to writing and signed by the parties as required by the statute. (West

Coast L. Co. v. Knapp, 122 Cal. 79, 54 P. 533), and cannot be aided by parol evidence, or the defect cured by oral waiver or oral agreement, so as to validate the contract. (Willamette etc. Co. v. College Co., *supra*; Donnelly v Adams, 115 Cal. 129, 46 P. 916, s. c. 59 P. 208.)

The fact that unsigned plans and specifications, not referred to in the contract, were attached to the contract, and the whole filed as one document, and that the house was actually built in accordance with such plans, can have no bearing upon the question whether the whole contract was reduced to writing and signed by the parties in compliance with the statute. (West Coast L. Co. v. Knapp, *supra*.)

The memorandum which may be filed as a substitute for the contract, is not, by the statute, required to be subscribed by the parties. (Joost v. Sullivan, 111 Cal. 294, 43 P. 896.)

The Contract or Memorandum thereof must be Filed. The Contract.

Sec. 154. Section 1183 of the C.C.P., *inter alia*, provides that "the said contract or a memorandum thereof [setting forth certain matters] * * * shall, before the work is commenced, be filed," etc.

The contracts required to be filed with the county recorder are original contracts the price of which exceeds one thousand dollars. (Sec. 146, *supra*.)

Failure to file such contracts renders them "wholly void." (See sec. 194, *infra*.) The statute, however, does not apply to implied contracts. (Rebman v. San Gabriel etc. Co., 95 Cal. 390, 30 P. 564.)

The statute requires the whole contract to be filed with the recorder. Therefore, where plans and specifications are referred to in, and form part of the contract, they must be filed with, and as a part of the contract. Otherwise the contract is wholly void. (Holland v. Wilson, 76 Cal. 434, 18 P. 412; Willamette etc. Co. v. College Co., 94 Cal. 229, 29 P. 629; Barker v. Doherty, 97 Cal. 10, 31 P. 1117; McMenemy v. White, 115 Cal. 339, 47 P. 109.)

If, in such case, the drawings and specifications are not filed with the contract, the contract in its entirety is not filed. (*Yancy v. Morton*, 94 Cal. 558, 29 P. 1111; *Pierce v. Birkholm*, 115 Cal. 657, 47 P. 681; *Kuhlman v. Burns*, 117 Cal. 469, 49 P. 585; *West Coast L. Co. v. Knapp*, 122 Cal. 79, 54 P. 533.)

And the contract, if it does not otherwise contain a sufficient description of the work to be done, is thereby rendered essentially uncertain, indefinite, inchoate and incomplete, and thereof void. (*Greig v. Riordan*, 99 Cal. 316, 33 P. 913; *Donnelly v. Adams*, 115 Cal. 129, 46 P. 916, s. c., 59 P. 208; *Willamette etc. Co. v. College Co.*, *supra*; *Pierce v. Birkholm*, *supra*.)

The general character of the work to be done, which is an essential part of the contract, cannot, therefore, be ascertained (*Id.*) and the contract cannot be aided by parol evidence or the defect cured by oral waiver or oral agreement. (*Donnelly v. Adams*, 59 P. 208.)

The statute provides that the *contract* or a *memorandum* thereof shall be filed. Therefore, the filing of a sun print copy of the plans and specifications will not meet the requirements of the statute where they are referred to in the filed contract as being signed by the parties to the contract although they bear the photographic representation of the signatures of the parties. (*San Francisco L. Co. v. O'Neil*, 120 Cal. 455, 52 P. 728.)

The mere filing does not make a void or defective contract valid. Without a valid contract there is nothing to file. (*Reed v. Norton*, 90 Cal. 590, 27 P. 426.)

The fact that materialmen and others have actual notice of the existence of an unrecorded original contract is not the equivalent of filing the same. This would be so if the question were one of notice. But it is not. If the contract is not filed, it is void and there is no fact or contract of which such persons are bound to take notice. (*Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *Butterworth v. Levy*, 104 Cal. 506, 38 P. 897.)

The objection that the original contract has not been filed for record as required by law cannot be first raised upon appeal. (*White v. Nat'l. Bank*, 98 Cal. 166, 32 P. 979.)

The Contract or Memorandum thereof must be Filed. The Memorandum.

Sec. 155. Section 1183, *inter alia*, provides that the contract, "or a memorandum thereof, setting forth

- (a) the names of all the parties to the contract,
- (b) a description of the property to be affected thereby,
- (c) together with a statement of the general character of the work to be done,
- (d) the total amount to be paid thereunder and the
- (e) amounts of all partial payments,
- (f) together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed," etc.

That part of section 1183 with reference to the memorandum and its contents was added to it by the amendment of 1887. See sec. 1, *supra*, for this section in full, amendments thereto, notes and explanation of figures and brackets.

The Memorandum. Generally.

Sec. 156. In 1887 (stat. 1187, 152,) the legislature amended section 1183, by providing that instead of filing the entire contract in the recorder's office, as had been previously required, there might be filed a memorandum thereof, "setting forth the names of the parties to the contract," etc.

After this amendment was made, the owner or the contractor, could satisfy the statute by filing either the contract, or such memorandum; but if he filed the contract, he must still file the whole of it, including drawings and specifications, if they were made a part thereof; while if he preferred to file the memorandum, such memorandum must contain all the matters which are prescribed in the statute as the equivalent of the contract. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; (*Reed v. Norton*, 90 Cal. 590, 27 P. 426.)

The design of the amendment of 1887 allowing the record of a memorandum of the contract, was to require less than was required before; and its language is to be construed in the light of the purpose to be effected by the filing of anything giving information of the contract between the owner and the the original contractor. (*Joost v. Sullivan*, 111 Cal. 286, 43 P. 896.)

The memorandum must contain all the matters which are prescribed in the statute as the equivalent of the contract, and if any of the required statements is not contained in the memorandum filed, such omission is fatal to the validity of the contract. (*Willamette etc. Co. v. College Co.*; *Reed v. Norton*, *supra*.)

On the other hand, the memorandum is not required to set forth matters not required by the statute. Therefore, a memorandum of a contract, sufficient in other respects, is valid notwithstanding it is not subscribed or signed by the parties. (*Joost v. Sullivan*, *supra*.)

Where the original contract is void, a memorandum thereof, however perfect in itself, which is filed, is of no force or effect. Without a valid contract there is nothing to record. (*Reed v. Norton*, *Willamette etc. Co. v. College Co.*, *supra*.)

A copy of the plans and specifications, strictly as such, cannot be considered as a memorandum of the contract under section 1183 though they might be considered as a memorandum of some part of the contract. (*San Francisco L. Co. v. O'Neil*, 120 Cal. 455, 52 P. 728.)

Since the memorandum is not required to be signed (sec. 153, *supra*.) a copy of the plans and specifications would certainly be sufficient as a statement of the general character of the work to be done.

The memorandum. Names of parties.

Sec. 157. The statute (quoted in sec. 155, *supra*.) requires that the memorandum which may be filed as a substitute for the original contract, shall set forth the names

of the parties to the contract. As we have just seen (sec. 154, *supra*), a violation of this provision of the statute, renders the contract void and consequently subjects the parties to the contract to the penalties imposed by the statute in cases of void contracts. (Sec. 194, *et seq.*, *infra*.)

The names required to be stated are those of the parties to the original contract, and the statute requires that "all" of them shall be set forth.

The memorandum. Description of property.

Sec. 158. The statute (sec. 155, *supra*), likewise requires that the memorandum shall set forth "a description of the property to be affected thereby," that is, to be affected by the original contract. The "property" here referred to is the land upon which the building or other structure or improvement is to be constructed. The next clause of the same section (1183) requires that the memorandum shall contain a "statement of the general character of the work to be done." This statement, therefore, furnishes a description of the building or other structure or improvement to be constructed. The latter clause of this section supplements the former and under them are required both a description of the land upon which the building, etc. is to be constructed, and a statement of the general character of the work to be done from which the nature and kind of building, etc., to be constructed, or of the alteration, addition, or repair to be made, may be determined. (See *Joost v. Sullivan*, 111 Cal. 286, 43 P. 896.)

There is nothing in the statute requiring the contract to contain a description of the property to be affected thereby, and it has been held that a contract which omits such description is not thereby rendered invalid. (*San Diego L. Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431; *Yancy v. Morton*, 94 Cal. 588, 29 P. 1111.)

The memorandum of the contract, in order to meet the requirements of the statute, must, however, contain such a description, the omission of which renders the contract void.

The memorandum. Statement of general character of work to be done.

Sec. 159. Section 1183, *inter alia*, provides, that the memorandum shall contain "a statement of the general character of the work to be done."

The work referred to here is the work to be done under the contract and it is a statement of the general character of that work which must be set forth in the memorandum.

The design of the amendment of 1887 (see sec. 156, *supra*,) to section 1183, allowing the filing of a memorandum of the contract was to require less than was required before; and the provisions for a description of the general character of the work to be done, cannot be construed to require a special, particular, minute and detailed description. (*Joost v. Sullivan*, 111 Cal. 286, 43 P. 896.)

Where, therefore, a filed memorandum of a contract for the erection of a building, sets forth the names of all the parties to the contract and a general statement of the character of the work to be done, it is not rendered insufficient because the memorandum is not signed, nor because plans and specifications are not filed therewith, if none are referred to in the memorandum; nor because there is no detailed description of the work to be done; and where the statement of the general character of such work is made in good faith and sets forth the size of the lot, and that a frame building already thereon is to be raised, repaired and additions made thereto, and converted into flats for the purpose of being used as tenements, the memorandum is a substantial and sufficient compliance with the statute. (*Joost v. Sullivan*, *supra*.)

But a memorandum of a contract for a building costing over one thousand dollars, filed in the recorder's office, in which the only description of the property and of the work to be done is that, "the building is to be a frame building," is fatally defective. (*Blyth v. Torre*, 38 P. 639.)

In the last case the court say:

"While the law requires no discription in detail of the general character of the work to be done, still it requires more than is here found. This statement is too general. To say that the building is to be a stone building or a brick building or a frame building, entirely fails in essentials to give that notice to the public which the law contemplates. By consulting the memorandum of contract it would be impossible to say whether the building is to be a diminutive cottage, or a large public caravansary, or whether the contract price is at all in proportion to the character of the building to be erected."

The same.

Sec. 160. So, where the memorandum describes the building as "three stories high" (*Willamette etc. Co. v. College Co.*, 94 Cal. 235, 29 P. 629;) or as a "two-story building 51 by 25 feet," (*Butterworth v. Levy* 140 Cal. 506, 38 P. 897;) or as a one-story brick building (*Wood v. Oakland etc. Co.*, 107 Cal. 500, 40 P. 806,) it is insufficient. These are not sufficient statements of the general character of the work to be done, and the contract, therefore, would be rendered void where its validity depended upon the filing of such a memorandum.

In *Butterworth v. Levy*, *supra*, the reason for holding the memorandum of the contract insufficient was that it did not set forth the material of which the building was to be constructed, or any item from which its general character could be ascertained; the dimensions and character of the work could not be determined (plans and specifications not having been filed), nor whether the building was composed of iron, brick, or wood.

It is not necessary to the sufficiency of the memorandum, or to the validity of the contract, that plans and specifications should be filed as a part of the memorandum when it otherwise contains a sufficient statement of the general

character of the work to be done. (*Joost v. Sullivan* 111 Cal. 286, 43 P. 896; *Reed v. Norton*, 90 Cal. 590, 27 P. 426.) The statute, as we have just seen, does not require a special, particular, minute or detailed description of the work to be done. But where the memorandum itself does not contain a sufficient statement of the general character of the work to be done and refers to plans and specifications for such statement, no copy of which is inserted in such memorandum or filed with it, it is fatally defective. (*Wood v. Oakland etc. Co.*; *Butterworth v. Levy*; *Willamette etc. Co. v. College Co.*, *supra*; *Greig v. Riordan* 99 Cal. 316, 33 P. 913; *Yancy v. Morton* 94 Cal. 561, 29 P. 1111.)

If the memorandum does not disclose that there are plans and specifications it is not essential to the sufficiency of the memorandum that they be filed. (*Joost v. Sullivan*, *Reed v. Norton*, *supra*.) The question in every case is whether the memorandum, if that be filed as a substitute for the contract, states the general character of the work to be done. (*Id.*)

The memorandum. Total amount to be paid and amount of all partial payments.

Sec. 161. Section 1183, *inter alia*, provides that the memorandum shall contain statements of "the total amount to be paid thereunder [under the contract], and the amounts of all partial payments, together with the times when such payments shall be due and payable."

It must be remembered that the statements in the memorandum required by the statute are mere memoranda of the contract. They are not statements outside of the contract. The names required to be stated are those of the parties to the contract. The statement of the general character of the work to be done is of that specially particularized in the contract. And so the statements of the total amount to be paid under the contract, the amounts of all partial payments, and the times when such payments become due and pay-

able, are mere memoranda of those matters as they have been agreed upon by the parties and stated in the contract.

Sections 1183 and 1184 require the original contract to set forth the contract price when it exceeds one thousand dollars, and that that price shall, by the terms of the contract, be made payable in installments, at specified times after the commencement of the work, or on the completion of specified portions of the work, or on completion of the whole work.

It will be observed that the memorandum to be filed as a substitute for the original contract, must, under the clause of section 1183 now under consideration, set forth all of the above statements required in the original contract. The "total amount to be paid" which must be stated in the memorandum, is the contract price, and the "amount of all partial payments, together with the times when such payments shall be due and payable," is the amount of the installments of the contract price which, by the terms of the contract, are payable at the times stated in the contract.

The same.

Sec. 162. In *Reed v. Norton*, 90 Cal. 590, 601-2, 27 P. 426, the contract with reference to the price, which was \$5500, provided that it should be paid:

1. Upon the written order of said Helm (contractor), he (Norton, owner), will pay the materialman for materials furnished as soon as the same is actually worked into the building, and whether the same be furnished directly to said Helm, or to his subcontractors;

2. Upon the written order of said Helm, he (Norton) will pay the mechanics and laborers upon said building at the end of every week for work actually done, and whether such laborers and mechanics be hired directly by said Helm or by his subcontractors;

3. When all the material and labor is paid for as afore-said, then said Norton will pay said Helm the balance of said contract price;

4. Provided; that said Norton may retain twenty-five per cent (\$1375) of said contract price until thirty-five days shall have expired after final completion of said contract."

The memorandum filed in this case as a substitute for this contract stated:

"Said Helm to be paid \$5500 for all work, labor and material; three-fourths thereof payable in installments as work progressed. (Said Norton to pay the materialmen, laborers and mechanics upon the written order of said Helm; laborers and mechanics to be paid weekly during the progress of the work, until said three-fourths is exhausted.) The other one-fourth payable thirty-five days after the final completion of the contract."

The point was made that this memorandum did not specify the time mentioned in the contract for making payments, and the court, at page 602, in overruling the same, say:

"We do not see but what this is a substantial statement of 'the amounts of all partial payments, together with the times when such payments shall be due and payable,' as set out in the contract and required to be in the memorandum under section 1183 of the C.C.P."

Time of filing contract or memorandum.

Sec. 163. Section 1183, *inter alia*, provides that the original contract whose price exceeds one thousand dollars, "shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing," etc.

The failure to file such a contract, or a memorandum thereof renders the contract wholly void (sec. 165, *infra*.) And the contract is also rendered "wholly void" if it, or a memorandum thereof, is not filed "before the work is commenced." (Powder Co. v. Flume Co., 78 Cal. 195, 20 P. 419;

not overruled on this point; sec. 1183 C.C.P. See finding not sustained by evidence, *Reed v. Norton*, 90 Cal. 590, 27 P. 426.)

The object in requiring original contracts whose price exceeds one thousand dollars to be filed before the work is commenced, is to give accurate and public information and timely notice of its terms to subcontractors, laborers, and materialmen. Such contracts being the measure of the liability of the contracting-owner to them, and the law being designed to give to them a priority in the payment of the contract price for their work and materials over the demands of the original contractor, the former, with this information at hand, are in positions, in the exercise of diligence and of care, and in pursuance of rights given to them by the statute, to secure and enforce this priority. (*Greig v. Riordan*, 99 Cal. 316, 319, 33 P. 913.)

If, however, the contract was not required to be filed before the work was commenced, or at all, then, since subcontractors, materialmen and laborers would be without definite information as to the amounts and times of payments of the price, the remedy given to them by the statute, by which they can intercept the price, or any installment thereof, in the hands of the contracting-owner, would be useless. Without public record of the contract, or under a provision permitting the contract to be filed after the commencement of the work, and under the lien law as it would then stand, the terms of the contract could be such that seventy-five per cent. of the price would become due and payable, and could be legally paid by the contracting-owner to the contractor, before knowledge of the terms of the contract could be obtained by lien-claimants.

The requirement that the contract, or a memorandum thereof, shall be made a public record not only affords public notice of the contents of the contract, but it also gives assurance to subcontractors, materialmen and laborers that the terms of the contract are just as they are stated in it, and that they can, therefore, safely take such proceedings

for the protection of their rights as they may deem proper, knowing that the owner and contractor cannot, by agreement or otherwise, modify or change those terms to their detriment. (Sec. 184, *infra*.)

Place of filing contract or memorandum.

Sec. 164. By the clause of section 1183 above quoted, the contract, or a memorandum thereof, must be filed with the county recorder of the county, or city and county, where the property is situated. This requirement of the statute has been fulfilled when the contract, or a memorandum thereof, has been filed with the proper county recorder. The statute does not require the contract, or a memorandum thereof, to be "recorded."

It will be observed that the statute does not provide that the contract, or the memorandum, shall be filed in the county, etc., in which the property "or some part thereof is situated." Where, therefore, the property is situated in two or more counties, it would seem to be necessary to the validity of the contract required to be filed, to file it, or a memorandum thereof, in each of such counties.

It is the duty of the parties to file the contract, or a memorandum thereof, with the recorder of the proper county. (*Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 P. 419.) The statute imposes severe penalties upon the parties to the contract, and especially upon the contracting-owner, for failure to file the contract, or a memorandum thereof, when such filing is required by the statute, and it is, therefore, to the interest both of the contractor and of the contracting-owner, to see to it that this provision of the statute is complied with.

Contracts "wholly void."

Sec. 165. Section 1183 finally provides that the contracts therein required to be in writing shall, if not in writing, subscribed by the parties and filed (or a memorandum thereof filed,) as therein provided, "be wholly void, and no

recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

The above provisions of section 1183 are so closely connected with similar provisions of section 1184 that, although it violates the plan of following the statute so far as practicable, yet, to avoid unnecessary repetition, it is deemed advisable to postpone their discussion until the provisions of section 1184 shall have been reached when and where the provisions of both sections shall be considered. (See sec. 194, *et seq.*, *infra*.)

The price must by the terms of the contract, be made payable in installments at specified times. The statute.

Sec. 166. Section 1184 of the C.C.P., *inter alia*, provides:

"No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of the specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the [a] contract."

By the amendment of 1885 to this section the words "work and" were stricken out at the place indicated by "[a]." (See sec. 2, for sec. 1184 in full, amendments thereto, notes thereon and explanation of figures and brackets.)

To what contracts section 1184 applies.

Sec. 167. In *Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932, the price of the contract there under consideration was less than one thousand dollars. There was no written contract and no reservation of twenty-five per cent. of the price for thirty-five days after final completion of the contract as required by section 1184. The point was made that, for these reasons, the contract was void. The court, after quoting sections 1183 and 1184 with reference to contracts and their essentials, at page 44, say:

“Reading these two sections together, we think it quite clear that the legislature did not intend to provide that twenty-five per cent. of the contract price should be payable thirty-five days after the completion of the contract in any case except ‘when the amount agreed to be paid thereunder exceeds one thousand dollars.’ The use of the phrase ‘any such contract’ in the clause of section 1184 immediately following the provision of section 1183 quoted above, indicates, we think, that the legislature intended to refer to the contracts which had just been spoken of in section 1183, namely, contracts in which the ‘amount agreed to be paid thereunder exceeds one thousand dollars.’ That such contracts were referred to is made evident from the peculiar language of the last clause quoted from section 1184, namely, ‘in case such *contracts* and alterations thereof do not conform substantially to the provisions of *this section*.’”

The application of the provisions of section 1184 to contracts whose price did not exceed one thousand dollars again arose in *Lumber Co. v. Cummings*, 86 Cal. 22, 24 P. 814, and in *Dennison v. Burrell*, 119 Cal. 180, 51 P. 1, and the rule was again laid down that these provisions with reference to stipulations as to the price did not apply to such contracts.

To bring a contract within the provisions of section 1184, its price must not only exceed one thousand dollars, but it must also be an original contract within the meaning of section 1183. (See sec. 146, *supra*.)

Price payable in installments. Comments on section 1184.

Sec. 168. Prior to the enactment in 1885 (stat. 1885, 144) of the provisions of this section, there was no statute prescribing the manner or the time of making payments of the contract price. Under the former statutes, the rule had been laid down that the contract between the contractor and the owner, whatever its terms, was the measure of the rights of all lien-claimants, and that, if according to the terms of this contract, there was nothing due to the contractor from the owner on account of the price, these persons could not enforce liens against the property of the owner for their labor and materials. (See *Knowles v. Joost*, 13 Cal. 620.)

Under these statutes there was nothing to prevent the owner from paying the contractor the whole, or any portion, of the price before the work was commenced, nor from stipulating in the contract, that the payments should be made before the commencement of the work or before the completion of the contract. The rule had also been laid down that lien-claimants could enforce their liens as against the property of the contracting-owner, to the extent only of the unpaid contract price due at the time of the filing of liens or of serving notices. (Sec. 303, *infra*.)

It will thus be seen that these statutes were wholly defective in that they failed, in many cases, to secure the very persons for whose protection and preference they were designed and enacted.

The provisions of section 1184 with reference to the time and mode of paying the contract price were undoubtedly enacted to cure these defects in the former lien laws. This section as it now stands, makes the price payable in installments and at specified times and thus gives an opportunity to lien-claimants to intercept, by notice, any installment of the price in the hands of the contracting-owner, before it becomes due and is paid, and also requires twenty-five per cent. of the price to be reserved thirty-five days after the completion of the contract which can likewise be reached by

lien-claimants, under section 1187, by filing claims of lien. (DeCamp L. Co. v. Tolhurst, 99 Cal. 631, 635, 34 P. 438.)

And if the owner neglects to retain twenty-five per cent. of the price for thirty-five days after final completion of the work and contract, when such reservation is required by the statute, he is responsible to the persons entitled thereto, to that extent, less any lawful credits the owner may be entitled to under section 1200 of the C.C.P., or otherwise. (Reed v. Norton, 90 Cal. 590, 27 P. 426.)

Price must be made payable after commencement of work.

Sec. 169. The first requirement of that portion of section 1184 under consideration is that, "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work but * * * shall * * * be made payable * * * after the commencement of the work * * *"

This statute is explicit as to the terms of the contract. It is both negative and affirmative. It provides first negatively against the defects of the former lien laws by providing that no part (installment) of the contract price shall, by the terms of the contract, be made payable in advance of the commencement of the work, and then affirmatively that the price and the installments thereof shall, by the terms of the contract, be made payable after the commencement of the work.

A contract, therefore, whose price exceeds one thousand dollars and which, by its terms, makes the price, or any part of it, payable in advance of the commencement of the work, would not be in substantial conformity with the provisions of section 1184 and the owner and the contractor would be subject to the penalties imposed by that section.

For subject of premature payment of contract price and payment thereof in advance, of commencement of work, see sec. 187, *infra*.

Price must be made payable in installments and at specified times.

Sec. 170. The second requirement of that portion of section 1184 under consideration is that,

1. "The contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or
2. On the completion of specified portions of the work, or
3. On the completion of the whole work; * * *

What has been said in the next preceding section with reference to making the price, or any installment thereof, payable in advance of the commencement of the work, is applicable here. The price and the installments thereof, must, by the terms of the contract, be made payable after the commencement of the work, and also at specified times after such event.

The statute has limited the times of payment of the installments to dates, or events in the performance of the contract. By the terms of the contract, therefore, the installments may be made payable at certain dates after the commencement of the work, or upon the completion of specified portions of the work as, for instance, the completion of the foundation of the building, etc., or upon the completion of the whole work.

The object of these statutory provisions undoubtedly is to require certainty as to the time when the installments of the price will become due and payable, so that subcontractors, laborers and materialmen shall have accurate information of the day, or the event upon which the installments, which they have the right to intercept in the hands of the owner, will become due and payable.

It should be observed that the statute requires the price, by the terms of the contract, to be made payable in installments and not in a gross sum. There is no authority, therefore, in the statute for making the whole contract price payable at any specified time, or upon any specified

event, after the commencement of the work. An installment of seventy-five per cent. of the price may, however, be made payable upon completion of the whole work, the other installment of twenty-five per cent. being reserved for thirty-five days thereafter.

The same. The decisions.

Sec. 171. In *Reed v. Norton*, 90 Cal. 590, 601, 27 P. 426, the contract provided: "For all materials, and for the construction of said building, as herein provided, said Norton (owner) agreed to pay said Helm (contractor) the afore-said sum of \$5500 (the price) as follows:

1. Upon the written order of said Helm he (Norton) will pay the materialman for materials furnished as soon as the same is actually worked into the building, and whether the same be furnished directly to said Helm or to his sub-contractors;

2. Upon the written order of said Helm, he (Norton) will pay the mechanics and laborers upon said building at the end of every week for work actually done, and whether such laborers and mechanics be hired directly by said Helm or by his subcontractors;

3. When all the material and labor is paid for as afore-said, then the said Norton will pay said Helm the balance of said contract price;

4. Provided that said Norton may retain twenty-five per cent. (\$1375) of said contract price until thirty-five days shall have expired after final completion of said contract."

The objection was made that this contract was defective in that the above specifications of time of payments were not in accordance with the requirements of the statute.

In answer to this objection the court, at page 601, say:

"We think these payments, to be made through Norton to the materialmen when their material was used in the building, and to the mechanics and laborers weekly, were specific enough as to time and amounts to comply substantially with the statute."

The same.

Sec. 172. In *Dunlop v. Kennedy*, 34 P. 92, the contract the price of which was \$6600, provided with reference to amounts and times of payment: "Twenty-five per cent. of the contract sum to remain unpaid until thirty-five days from and after completion of said building and its acceptance by the within named architect. The remaining amount to be paid in partial payments in amount equal to seventy-five per cent. of the value of the work done and materials furnished at the time of such payments." The payment of the installments was to be made upon the certificate of the architect. (102 Cal. 443.)

The court, in upholding the contract, at page 94, say:

"I think the contract in question substantially complied with the requirements of this section. The owner cannot, with safety, agree to pay a definite amount on a particular day, as he cannot know in advance whether the contractor will have earned the payment; and if the payment is to be made upon reaching certain stages of the work, it only furnishes the means of ascertaining the day of payment when it actually arrives. The whole object of the provision is to protect materialmen, and any specification which accomplishes this purpose is sufficient."

Dunlop v. Kennedy, *supra*, was overruled in s. c. 102 Cal. 443, but not upon the point to which it has been cited.

In *Buell v. De Turk* (Superior Court of L. A. Co., Judge Shaw, 1898) the provisions of the contract with reference to the payment of the contract price, were as follows:

"All bills for material and labor, when endorsed by the contractor, will be paid on demand, provided that such bills for material and labor do not exceed seventy-five per cent. of the value of the material and labor employed in the erection of the building up to the date of such bills. \$495 to be paid thirty-five days after the building is finished and completed." \$495 amounted to twenty-five per cent of the contract price. It was held that these stipulations of the contract complied substantially with the statute as to the time and the amounts of payment of the contract price.

Reservation of twenty-five per cent. of the whole contract price.

Sec. 173. The final requirement of that portion of section 1184 under consideration is that, "provided, that at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the [1] contract." * * * *

By amendment of 1885 to this section the "work and" were stricken out of it at the place indicated by "[1]." (See sec. 2, *supra*, for section 1184 in full, amendments thereto, and notes thereon.)

This provision was evidently inserted in the statute for the protection of subcontractors, materialmen and laborers, thus giving them, if unpaid, ample time after the work is completed to file their claims of lien and secure payment of any sums of money due them. (*De Camp L. Co. v. Tolhurst*, 99 Cal. 631, 635, 34 P. 438; *Wilson v. Nugent*, 125 Cal. 280, 57 P. 1008.)

The two points to be considered under the clause of section 1184 just quoted are that,

(1) twenty-five per cent. of the whole contract price shall (by the terms of the contract) be made payable

(2) thirty-five days after the final completion of the contract.

The same. The amount.

Sec. 174. The statute requires that twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. A failure to observe this requirement is followed by a failure to receive the benefits by the owner and contractor of the lien law.

In *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629, the contract provided that the "last or final payment (of the price) to be made thirty-five days after final completion of the work according to contract," without specifying the amount of that payment.

It was also provided in the contract that seventy-five per cent. of the *cost* of material and work completed at the time of payment is to be paid on the first and third Saturdays of each month as the work progresses," but there was no provision in the contract reserving twenty-five per cent. of the whole price for thirty-five days after the final completion of the contract.

The court in holding these provisions of the contract insufficient under the statute, at page 235, say:

"There is a manifest difference between setting forth the *amount* that is to be paid at any particular date, and stating that a certain per centage of the *cost* will be so paid. Although the *cost* and the *contract price* of the work contracted for may be the same, yet there is no necessary connection between the two.

"It is easy to see that a contract might be entered into at such a figure for the entire work that a payment of seventy-five per cent of the *cost* of the material and work completed at stated times as the work progressed would exhaust the entire *contract price*, at or before the completion of the building, so that there would be nothing with which to meet the liens that might be filed within thirty days thereafter."

It is not necessary, however, to make a calculation and state in the contract in dollars and cents the amount of the payment reserved for thirty-five days. A contract which provides generally that twenty-five per cent. of the sum to be paid thereunder shall remain unpaid until thirty-five days after completion of the contract and that the remainder of the price shall be paid in partial payments equal to seventy-five per cent. of the *value* of the work done and materials furnished, sufficiently complies with the statute (*Dunlop v. Kennedy*, 34 P. 92 overruled in s. c. 102 Cal. 443, but not on this point.)

The same. The same.

Sec. 175. The statute requires that twenty-five per cent. of the *whole* contract price shall be made payable at least thirty-five days after the final completion of the contract. In *Stimson M. Co. v. Riley* 42 P. 1072, the price of the contract was \$2180 and the contract provided that the balance of the price, \$530 should be payable in the usual thirty-five days. The amount reserved, it will be noticed, is \$15 less than twenty-five per cent. of the whole contract price, but it was held that the contract was in substantial compliance with the requirements of the statute and that the deficiency of \$15 was so trivial that, in view of the whole amount of the last payment and the consequences to the owner if it was held not to be a substantial compliance, the maxim "*de minimis non curat lex*" should be applied. It also appeared that the lien claimants were in no way injured by the small deficiency reserved in the last payment since much more than twenty-five per cent. of the contract price was in fact reserved and paid into court for the use and benefit of them.

Reservation of twenty-five per cent. of whole contract price. Time of payment.

Sec. 176. Twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract.

The courts have uniformly given this provision a liberal construction in favor of the owner and have upheld contracts whose provisions with reference to the time of the final payment, have not been in strict conformity with the statute.

In *Yancy v. Morton*, 94 Cal. 558, 561, 29 P. 1111, the contract provided that thirty-five days after the completion of the building the balance (twenty-five per cent.) of the contract price should be paid, "provided that payment may be made at any time between the date of completion and

the said thirty-five days, in case said contractors show receipts and give special bonds that all bills will be paid, and that no liens or other claims exist against said premises; such payment to be optional with the owner."

The court, at page 561, say:

"It would seem that the foregoing provision of the contract is in substantial conformity with the requirement of section 1184 of the C.C.P.; and the section, in terms, only requires a substantial compliance in this regard. The proviso found in this contract was undoubtedly inserted for the benefit of the contractor, yet, at the same time, it was in no way detrimental to the interests of any prospective lien-claimant, for the section expressly so provides."

In *San Diego L. Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431, the contract, by its terms, made the final payment of twenty-five per cent. due thirty days after final completion of the contract.

In holding this contract to be in substantial conformity with the provisions of the statute under consideration, the court, at page 579, say:

"But is there such a substantial non-conformity with the requirements of the code as will justify a judgment against the owner to pay again a debt which he has already paid in good faith upon his contract? In determining this question it must be kept in mind that this is a penalty, and not a statutory mode of acquiring a right against another, as in the case of a claim of lien. In the latter case, although the rule has been somewhat relaxed in favor of liens under this chapter, very great strictness of performance is generally exacted, but every reasonable intendment is indulged to avoid a penalty.

"The plaintiff has not been injured, nor can we see how any lienor could be, by the fact that the final payment became due in thirty rather than thirty-five days. Their liens must be filed within thirty days, and attach before this payment could legally be made under this contract. As they are in as good a position as they would have been had the time been thirty-five days, I think the penalty has not been incurred."

The same.

Sec. 177. The contract in *West Coast L. C. v. Knapp*, 122 Cal. 79, 54 P. 533, provided that the last payment "shall be made *within* thirty-six days after this contract is fulfilled."

It was objected to this provision of the contract that it did not make the last payment payable *after* the final completion of the contract, and that under it, the payment was due at any time within the period of thirty-six days at the option of the owner.

The court, in overruling these objections, at page 81, say:

"I think a debt cannot be said to be due until the creditor can rightfully demand and insist upon payment. This is the usual and conventional meaning of the language as applied to deferred payments * * * When money is due, suit may be brought to recover it, and the statute of limitations begins to run against it. Important consequences also follow in regard to its transference. In regard to these consequences, the money is not due in this contract until after the expiration of the thirty-six days. In short, when the debtor is allowed a certain period within which to make payment, the debt is not due until the expiration of that period. The words of the statute must be understood in their popular sense, and, so understood, the contract does no violate the statute."

"The statute provides that the last payment of twenty-five per cent. of the contract price "shall be made payable at least thirty-five days after the final completion of the contract." There is, therefore, no limitation upon the time in excess of thirty-five days after which the last payment may be made payable. The time may be thirty-six days (*West Coast L. Co. v. Knapp, supra*.) or a longer period, after the final completion of the contract.

The time runs from the "final completion of the contract." As already noted, the amendment of 1885 to this section struck out the words "work and" next preceding the word "contract" in the clause of the statute under consideration.

Contract price payable in money only.

Sec. 178. Section 1184, *inter alia*, provides that, "As to all liens, except that of the contractor, the whole contract price shall be payable in money," etc.

This provision of section 1184 changed the rule under the former statutes as to all liens except that of the contractor. (*Dore v. Sellers*, 27 Cal. 588.) And it now applies to all original contracts irrespective of the price.

In *Baird v. Peall*, 92 Cal. 235, 28 P. 285, the plaintiff entered into a written contract with the defendant (owner) to paint the building of the latter and to furnish the necessary materials therefor. The contract price of the work as stated in the contract was \$390 and it was therein stipulated that the plaintiff should accept, as part payment of the price, certain contracts for certain lots of land to the amount of \$150.

It was contended that the contract was wholly void because the whole price was not made payable in money pursuant to the clause of section 1184 under consideration.

The court, after holding plaintiff to be an original contractor and therefor within the exception expressed in that clause, at page 237, say:

"Had plaintiff contracted to do the work in consideration that defendant should convey to him certain land or personal property, without fixing the money price or value of the work, perhaps he would not have been entitled to a lien; but the money price of the whole work is fixed by the contract though a specified portion of that price (\$150) is to be paid in land. Upon a breach of the agreement to pay \$150 in land, the damages would be liquidated and certain, and precisely the same as they would be in case of the breach of any agreement to pay so much money. The exception in favor of the contractor, in the provision of the code (under consideration), indicates, if it does not imply, that he may contract and have a lien for the value of his work payable otherwise than in money; and this is in perfect accord with section 1183 which provides that he shall have a lien for the value of the labor done and materials furnished."

But a debt due from the contractor to the owner, which is part of the consideration of the contract, would not come within this rule. In such case, that part of the price represented by the "debt" could not become a lien in favor of the contractor. (*Dore v. Sellers, supra.*)

Under sections 1183, 1184 and 1201 a laborer is entitled to foreclose a lien for his work done for the contractor, although the contract price is less than one thousand dollars and is made payable in something other than money, where it has not in fact been paid when the claim of lien is filed and the action commenced. (*Schmid v. Busch, 97 Cal. 184, 31 P. 893.*)

**False statement of price renders contract
"wholly void." The statute.**

Sec. 179. Section 1202, *inter alia*, provides:

" * * * If the owner and his contractor shall directly or indirectly conspire to or agree that the written contract filed shall appear to show the contract price to be less than it really is, and it shall accordingly so show, then such contract shall be wholly void, and no recovery shall be had thereon by either party thereto, and in such case the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner and they shall have a lien for the value thereof." (See sec. 20, *supra*, for the above section in full, and notes thereon.)

The above provision of section 1202, so far as the penalty imposed thereby is concerned is an exact copy of the provision in section 1183 which will be considered in a subsequent section (194) of this chapter. The decisions upon the latter provision are applicable to this provision and must control.

It should be observed, however, that section 1202 applies only to written contracts filed for record, that is, to original contracts whose price exceeds one thousand dollars. (See sec. 146, *supra*, of this chapter.)

Waiver and impairment of lien. Statute and decisions.

Sec. 180. Section 1201 of the C.C.P. reads as follows:

"It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void."

The provisions of this section apply to all contracts irrespective of the price. (*Schmid v. Busch*, 97 Cal. 184, 188, 31 P. 893.)

Prior to the enactment of this section in 1885 (stat. 1885, 146) it had been held, under the lien law of 1868 (stat. 1868, 589), that the contractor and owner could not deprive the materialman of his lien, by a clause in the contract, by which the contractor agreed to indemnify the owner against any liens taken by persons furnishing materials to be used in construction of the building. (*Whittier v. Wilbur*, 48 Cal. 175.)

So under the present law where the price of the original contract is less than one thousand dollars and is, therefore, not within the provisions of sections 1183 and 1184, with reference to formalities and stipulations as to price, it is not in the power of the owner and contractor by making the contract price payable in land, to deprive lien-claimants of their liens. (*Schmid v. Busch*, *supra*.)

A miner does not lose his rights to a lien by giving an order on the owner of the mine for a portion of the amount due him for his labor thereon, if the order was not received by the payee in payment of any claim against the drawer, nor paid or accepted by the drawee, but returned to the drawer before filing of his claim of lien. (*Palmer v. Uncas M. Co.*, 70 Cal. 614, 11 P. 666.)

Lien-claimants who sign a composition agreement waive their rights to lien. (*Wilson v. Samuels*, 100 Cal. 514, 35 P. 148. For instructions to jury concerning waiver see *Castiagnino v. Balletta*, 82 Cal. 250, 23 P. 127.)

Contractors and lienors may wave liens.

Sec. 181. There is nothing in section 1201, or in any other section of the lien law, which inhibits the original contractor from waiving his personal right to a lien, either by the terms of his contract, or in any other way. The inhibitions of section 1201 are directed solely to the authority of the original contractor and owner, or either of them, by their contract to waive, affect or impair, the liens of other persons without the written consent of the latter. Nor is there anything in section 1201, or in any other section of the lien law, which prevents subcontractors, materialmen and laborers from waiving their rights to liens. On the contrary, there is, in this section, express statutory authority, permitting them to waive, affect or impair their liens by their "written consent." The lien given to them by the statute is a mere personal right intended solely for their benefit and such waiver would not contravene public policy (Sec. 3512 Civil Code; see *Wilson v. Samuels*, 100 Cal. 514, 35 P. 148; *Palmer v. Uncas M. Co.*, 70 Cal. 614, 11 P. 666; *Jenne v. Berger*, 120 Cal. 444, 52 P. 706.)

It will be observed that the consent of subcontractors, materialmen and laborers, must be expressed in writing, and further that they are not chargeable with notice of the terms of the contract which waive, affect or impair their rights to liens. These provisions of the statute, with reference to notice, have changed the rule which obtained under the former statutes and decisions.

In *Bowen v. Aubrey*, 22 Cal. 566, Packard and others contracted in writing with Aubrey that the latter should erect a building for them, and in the agreement Aubrey covenanted that he would not incumber or suffer to be incumbered the building or the lot on which it was to be erected, by any mechanic's lien or debt on account of labor or materials or otherwise. Aubrey sublet the brick work to Craft, who had notice of the existence of the written agreement, and it was held that Craft, the subcontractor, was precluded by the condition in the original contract from acquiring a mechanic's lien upon the building for the work done by him. (*Shafer v. Murdock*, 36 Cal. 293, 298.)

Effect of violation of section 1201.

Sec. 182. A violation of the statute under consideration, by the contractor and the owner, or by either of them, does not render the whole contract void and make the property of the owner chargeable with liens of subcontractors, materialmen and laborers for the full value of their work and materials. The penalty imposed is that the term of the contract waiving, affecting or impairing the liens of persons other than the contractor, shall be null and void. The terms of the contract, in other respects, remain in full force and effect and measure the rights of all lien-claimants as against the owner.

Lien not waived, merged or destroyed by judgment against party personally liable.

Sec. 183. In *Germania etc. Asso. v. Wagner*, 61 Cal. 349, 355, the court had under consideration the effect of the entry of judgment upon the lien of the mechanic, and there said:

“There are two controlling reasons why a mechanic’s lien will not be destroyed by the entry of a judgment. First, because there is merger of the claim and not of the security. The first we have already considered; the second is fully set forth by the Supreme Court of Pennsylvania in the case of *Thompson (2 Brown’s)* substantially as follows: Whenever the law works an extinguishment, the creditor has gained a higher security; the thing substituted is more beneficial to the creditor than the thing contracted for. Now, the debts of the mechanic; or materialman, were originally simple contract debts, but for their security the act has created a lien on the building; so that the security which the creditors have in relation to the safety of the debts ranks with that of a judgment or mortgage. Therefore, the acceptance of a bond and warrant of attorney, and the entering of a judgment on the bond, is not a waiver or extinguishment of the mechanic’s lien.

“ The rule seems to us not only reasonable and just, but in accordance with the analogies of the law in cases of mortgages, pledges, etc., and we have been referred to no authority to the contrary.”

As to the first point mentioned in the above opinion, it was said that the lien act was but a collateral security for the debt; and that the claimant also had a convenient remedy by personal action. (For subject of waiver of lien by attachment proceedings, see sec. 425, *infra*.)

Alteration of contract. Effect on liens. The statute and decisions.

Sec. 184. Section 1184 of the C.C.P., *inter alia*, provides:

“ * * * no alteration of any such contract shall affect any lien acquired under the provisions of this chapter.” (Secs. 1183-1203.)

This provision of the statute is solely for the benefit of lien-claimants other than the contractor, and by it the rights of the former to liens are preserved, notwithstanding any alteration of the contract by the original contractor and owner. This provision, however, is not intended to prevent the contractor and owner from changing or modifying the terms of their contract at all. Cases frequently arise where the plans and specifications are defective, or where the contemplated structure must be changed in the arrangement of its parts in order to make it available for the uses for which it was designed. In such cases the terms of the contract must be changed to meet the new situation, and such change or alteration may affect the contract price as between the contractor and the owner, but under this statute, whatever the effect of the alteration of the terms of the contract may be as between them, it does not affect the liens of subcontractors, materialmen and laborers acquired under the lien law.

The written contract may be changed by an executed oral agreement and where the contract is substantially completed according to such changed terms, the right to enforce a lien is not lost by failure to complete the structure strictly according to the terms of the written contract. (*Anderson v. Johnston*, 120 Cal. 657, 53 P. 264.)

The alteration of the terms of a contract by agreement of the owner and contractor does not affect or impair the lien of a mortgage which was taken by the mortgagee with notice of the terms of the contract. (*Soulé v. Dawes*, 7 Cal. 576.)

The same. Former rule not changed.

Sec. 185. The clause of section 1184 under consideration did not introduce any new rule into the lien law. Before its enactment the court had declared that upon compliance by subcontractors, laborers and materialmen with the terms of the statute, their rights to liens must be determined and controlled by the terms of the original contract between the owner and the original contractor; that such persons were presumed to have notice of the existence of such contract, a knowledge of its terms, and the rights and obligations of the parties thereto, and to have taken subcontracts, contributed labor and furnished materials in furtherance of the work in strict subordination to such terms, relative rights and obligations; that the parties to such contract, as well the owner as the original contractor, were equally presumed and bound to know that, with reference to the entire work embraced in the original contract, persons occupying thereto the relation of subcontractors, laborers and materialmen, possessed an interest in the money to become due the original contractor from the owner under the contract, with the privilege and right under the statute of securing and enforcing a lien upon the structure and premises to the extent of such interest, which

no subsequent agreement or act of the parties to the original contract could, without timely notice to, or consent of, such third parties, impair or divest. (*Shaver v. Murdock*, 36 Cal. 293, 298; *Davis v. Livingston*, 29 Cal. 291, § 77, *supra*)

Alteration of contract. Generally.

Sec. 186. Where a contract provides that "no extra work is to be paid for except by contract in writing," the parties may verbally rescind this provision and agree to alterations. (*McFadden v. O'Donnel*, 18 Cal. 160.)

If the building contract provides that no extra work shall be paid for unless the price has been fixed by the parties, there can be no recovery for such work if no price was fixed or agreement made by either party at the time the extra work was done. (*Meigs v. Bruntsch*, 54 Cal. 601; *Clark v. Teale*, Superior Court, L. A. Co., 1896, Judge Van Dyke.)

So where the contract provides that all claims for extra work shall be submitted to arbitration, the contractor cannot recover for extra work done and materials furnished where it appears that he has made no offer or request to submit his claims for extra work to arbitration. (*Scammon v. Denio*, 72 Cal. 393, 14 P. 98.)

The original contractor and his subcontractor cannot, by any provisions of their contract, alter or modify the terms of the contract between the original contractor and the owner. (*Downing v. Graves*, 55 Cal. 544; as to term of credit, see *Gamble v. Voll*, 15 Cal. 508.)

Premature payment of contract price. The statute.

Sec. 187. Section 1184 of the C.C.P. *inter alia*, provides:

"No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall

be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the [87] reputed [87] owner in any amount for damages or otherwise, for non-performance of his contract or otherwise." (See sec. 2, *supra*, for section 1184 in full, amendments thereto, notes thereon, and explanation of figures and brackets.)

Premature payments. Comments on section 1184.

Sec. 188. That part of section 1184 quoted in the next preceding section of this chapter, gives statutory force to the rule which necessarily results from the principle uniformly laid down by the courts that the contract is the measure of the rights of all lien-claimants, and prevents the premature payment of the contract price which the statute, provides, in effect, shall be reserved as a fund out of which the claims of subcontractors, materialmen and laborers shall be paid in preference to the demands of the original contractor.

Under an original contract the price of which does not exceed one thousand dollars, the contracting parties are at liberty to make such terms and stipulations as to the time of payment of the price as they may deem proper. (Sec. 167, *supra*.) But where the price of the original contract exceeds one thousand dollars, the provisions of section 1184 with reference thereto, must be observed, but, in either case, a premature payment of the contract price, or of any installment thereof, is invalid for the purpose of "defeating, diminishing, or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made and shall be applicable to such lien," etc.

Premature payments. The decisions.

Sec. 189. Where, by the terms of the contract, a portion of the contract price is not due until after the completion of the building, and materials have been furnished for and used in the construction thereof, and thereafter, and with notice thereof, the owner pays the original contractor in full, before the building is completed, he is liable to the materialman to the extent of the contract price thus prematurely paid, and to that extent the materialman may have an enforceable lien against the premises. (*Walsh v. McMenomy*, 74 Cal. 356, 16 P. 17.)

This decision was based upon the law as it stood before the enactment in 1885 of section 1184 but the rule laid down is the same as that now given statutory force by section 1184.

The continued liability on a premature payment, imposed by section 1184, does not depend on notice by the lien-claimant to the owner to withhold payment provided for by the same section. Nor does failure by the lien-claimant to give such notice relieve the owner from such liability. (*Sweeney v. Meyer*, 124 Cal. 512, 57 P. 479.)

Where rights of materialmen to enforce liens upon a building have been lost by failure to file their claims of lien in time, it is immaterial to them whether the owner has made a proper disposition of the unpaid portion of the contract price. (*Johnson v. LaGrave*, 102 Cal. 324, 36 P. 651.)

But where the contract provides for payments as the work progresses, payments made when the work has been substantially finished to the required stage, cannot be considered premature, so as to subject the owner to liability to materialmen to the additional extent of the payments so made. (*Stimson M. Co. v. Riley*, 42 P. 1072; *Patten v. Lawrence*, Superior Court L. A. Co., Judge Shaw, 1896.)

Effect of premature payment.

Sec. 190. A violation of the clause of section 1184 under consideration does not subject the owner to the penalty of having his property charged with liens of subcontractors, materialmen and laborers, for the value of their work done and materials furnished. That penalty is imposed only "in case such contracts and alterations thereof do not conform substantially to the provisions of this [1184] section," etc. In case of premature payment of the price, the contract itself may, as it usually does, conform with the provisions of section 1184. That penalty results when the stipulations of the contract are not in substantial accordance with the requirements of that section. But the premature payment of the contract price is entirely outside of the contract and of its stipulations, and such payment cannot, by any reasonable rule of construction, be brought within the penalty mentioned. This is made clear by the language of the section which is that, in case of premature payment, such payment shall be deemed as if not made and shall be applicable to all liens except that of the contractor.

The effect, therefore, of a premature payment is not to subject the property of the owner to liens for the value of all work done and materials furnished, but to the extent only of the amount of the price thus prematurely paid. (*Walsh v. McMenomy*, 74 Cal. 356, 16 P. 17.)

It seems, however, that a premature payment of the price to lien-claimants does not subject the owner to this penalty. (*Ganahl v. Weir*, Superior Ct. L. A. Co., 1898, Judge Van Dyke.)

Payment of contract price. Certificate of architect.

Sec. 191. Building contracts usually contain a provision to the effect that before payment of any installment of the price, the contractor must obtain from the architect, his signed certificate that the work upon the completion of

which the payment is to be made, has been done in a good, workman-like manner, and in accordance with the stipulations of the contract.

Under this and similar provisions the question has arisen as to the effect of the architect's certificate upon the rights of the parties.

In *Dingley v. Green*, 54 Cal. 333, the contract provided that payments should be made upon the certificate of the architect who was required by the contract, among other things, to certify that all the work of the mechanics and others employed by the original contractor, had been paid, and it was held that the certificate of the architect, given under the terms of the contract, was conclusive of the rights of all parties, unless it could be shown that it was obtained by the owner by collusion or fraud. (But see *McFadden v. O'Donnell*, 18 Cal. 160.)

In another case, the contract provided that, for each of the payments, a certificate of the architect should be obtained and presented, and that, at the time of the presentation, there should not be any liens against the building. The certificate of the architect was obtained and presented, but there was a lien against the building, and it was held that notwithstanding the certificate, the installment for which the certificate was given was not due. (*Holmes v. Richet*, 56 Cal. 307.)

Where a subcontractor did not procure the certificate of the architects named in the contract, as provided by its terms, because the contractor against whom the action was brought by the subcontractor, by his own act, dismissed the architects from his employ, but did not obtain the certificate of other architects in charge of the work, sufficient compliance with the contract in that regard is shown. (*Griffith v. Happersberger*, 86 Cal. 606, 25 P. 137, 487.)

This and similar provisions in the contract with reference to the production of the certificate of an architect, are for the benefit of the owner and he may, therefore, waive them and accept other proofs of the required facts. (*Blethen v. Blake*, 44 Cal. 117.)

Payment of contract price. Application of payments.

Sec. 192. Pending the delivery of bricks, and within a few days thereafter, the original contractor paid money to the plaintiff expressly directing the application of the payment. The plaintiff, in violation of such direction, applied a portion of the payment to a debt due him from the contractor previous to the making of the contract, and it was held that he had no right to do so. (*Goss v. Strelitz*, 54 Cal. 640.)

Where the contractor delivered to a materialman of his subcontractors, certain checks payable to the order of the subcontractors, to enable the materialman to get his pay, and the subcontractors indorsed the checks to the materialman, who applied the money to the payment of other indebtedness due him from the subcontractors, a finding that the materialman was paid was proper. (*Petersen v. Shain*, 33 P. 1086.)

Money paid by a contractor to a materialman, and applied by him on account of another building contract, and other accounts due him from the contractor, not connected with the building contract in question, cannot be applied by the owner of the building to reduce the claim of lien of the materialman, notwithstanding the fact that the contractor used the receipt from the materialman in obtaining a credit on the building contract, and in inducing the owner of the building to advance further money, if the application of the payment to the present building contract was repudiated by the materialman, who settled with the contractor, without his claiming the benefit thereof, and the inducing of further money from the owner by the unauthorized use of the receipt by the contractor was without the knowledge or consent of the materialman. (*Lumber Co. v. Neal*, 91 Cal. 362, 27 P. 743.)

Payment of contract price. Assignment of contract. Payment to assignor. Notice.

Sec. 193. When money is paid under a building contract to the original contractor, before notice of a previous assignment of the contract, the assignee cannot recover the sum so paid, from the owner of the building. And where a notice of an assignment of such a contract, written in English, is given to one who does not read or write English, the notice, in order to be effectual, must be sufficient, precise and complete enough to put the defendant fully on his guard as to the fact of such assignment, and to make him understand it. Whether notice was given or not, and if given, whether the person to whom it was given understood it, and whether it was sufficient to put a prudent man upon inquiry, are questions of fact. (*Renton v. Monnier*, 77 Cal. 449, 19 P. 820.)

An agent has such authority as the principal actually or ostensibly confers upon him. When the authority of an architect is specially conferred in a written contract for a building, he is not authorized to receive notice of an assignment of the building contract, so as to bind the owner of the building by such notice, if such authority is not expressly conferred. (*Renton v. Monnier*, *supra*.)

Where one who has retained twenty-five per cent. of the contract price for the repair of a building, after he has knowledge of the appointment of an assignee for the benefit of the contractor's creditors, and a demand made by him for the money retained, without any order of court, or any judgment as to the validity of the alleged liens, pays them, he pays them at his own risk, and if they are not valid liens, he will be liable to the assignee for the amount paid. (*Wilson v. Nugent*, 125 Cal. 280, 57 P. 1008; sec. 414, *infra*.)

An assignment made by the original contractor to another person, before completion of the work, vests in the assignee, prior to the expiration of the thirty-five days from the date of the completion of the work, no rights different from or superior to, those of the original contractor. But an

assignment of the balance of the contract price, after it has become due and payable, under the terms of the contract, with notice to the reputed owner of such assignment, cuts off all rights of materialmen in the funds so assigned, and any notice afterwards given by materialmen is futile, provided the assignment was without notice of the unpaid demand. (First Natl. Bank v. Perris I. Dist., 107 Cal. 55, 40 P. 45; Board of Education v. Blake, 38 P. 536; see Newport Wharf Co. v. Drew, 125 Cal., 585, 58 P. 187; as to notice under sec. 1184, see sec. 354, *infra*.)

An assignee of a sum due under such contract who purchases in good faith and for value, takes the assignment free from the latent equities of third persons of which he has no notice. (First Natl. Bank v. Perris I. Dist., *supra*.)

The contractor cannot split his demand against the owner, and by assignment of a portion thereof impose upon the owner, without his consent, the legal obligations to pay the assignee. (Clancy v. Plover, 107 Cal. 272, 40 P. 394.)

In a suit to foreclose a lien for street work by one to whom the original contract with the property owner had been assigned, a writing signed by the original contractor releasing defendant from all claims under the contract, was admissible, though plaintiff was unaware of such release when he took the assignment. (Rauer v. Fay, 110 Cal. 361, 42 P. 902.)

**Contracts void under sections 1183 and 1202,
and in violation of section 1184. The
statutes.**

Sec. 194. Section 1183 of the C.C.P. provides, *inter alia*, that if the contract mentioned therein be not in writing, subscribed by the parties thereto and filed, etc.

“they [it] shall be wholly void, and no recovery shall be had thereon by either party thereto; and, in such case, the labor done and materials furnished by all persons aforesaid,

except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

(For sections 1183, 1184 and 1202 in full, amendments thereto and notes, see secs. 1, 2 and 20, *supra*.)

Section 1202 contains the same provision and renders the contract wholly void if, by conspiracy or agreement between the owner and the contractor, the contract price is shown to be less than it really is.

Section 1184, *inter alia*, provides:

"In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof."

Void contracts, etc. Comments on statutes.

Sec. 195. It will be noticed that the difference between section 1183 and section 1184 is, that the former declares the contract "wholly void," whereas the latter does not. The reasons for this difference is not quite apparent yet, the the subject matter of the two sections affords some clue to them. Section 1183 provides that the contract, in certain cases, shall be in writing, subscribed by the parties thereto, and filed. Section 1184 provides more especially for the contract price and the time and manner of its payment. The design of the former section is undoubtedly to give public notice to all subcontractors, materialmen and laborers, of the terms and conditions of the original contract. To give this information it is indispensable that the original contract shall be in writing, subscribed by the parties and made a public record.

The contract between the owner and the contractor is, and must be, if valid, the measure of the rights of all lien-

claimants. (Secs. 298, 303, *infra*.) Their rights to liens are subject to all the terms and conditions of the contract, if valid, and they are always limited in their demands against the owner to the balance of the contract price due and payable according to the terms of the contract. (Sec. 303, *infra*.) An unwritten, and therefore, an unrecorded original contract, would not and could not, where so many and varied interests are at stake, give to subcontractors, laborers, and materialmen, satisfactory information of the terms and conditions of the contract, nor furnish them with assurance, however diligent in their inquiries they might be, that those terms and conditions would not be made the subject of dispute between the owner and his contractor.

The statute (sec. 1183), therefore, requires a written and recorded original contract where its price exceeds one thousand dollars (sec. 147, *supra*) and for a non-compliance with the statute in this respect, imposes a severe penalty upon the parties violating it by declaring the contract "wholly void," subjecting the property of the owner to liens of all persons, except the contractor, and denying the owner and the contractor the right to recover upon such contract at all. (*Morris v. Wilson*, 94 Cal. 644, 32 P. 801; *Spinney v. Griffith*, 98 Cal. 154, 32 P. 974.)

The same. Section 1184.

Sec. 196. On the other hand, the special provisions of section 1184 with reference to the time, mode and manner of payment of the contract price, are designed to preserve and secure the contract price to lien-claimants, other than the contractor, as a fund out of which their claims may be paid. The amount of the contract price and the times of payment thereof, are made definite and certain by the written recorded contract, and if there are violations of these provisions of that section, in any respect, lien-claimants are fully protected since, by that section, they are given liens upon the property of the owner, for the value of their labor done and materials furnished irrespective of the contract price and of the time and manner of its payment. (*Lumber Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431.)

contract conform with its provisions. On the other hand the penalty imposed upon the owner is that all persons, except the contractor, are entitled to liens for the value of their work and materials, whereas under a contract which conforms with the provisions of that section, the liabilities of the owner are measured by the contract and its price. (See *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; *San Diego L. Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431; *Yancy v. Morton*, 94 Cal. 558, 29 P. 1111; *Stimson M. Co. v. Riley*, *supra*; as to the competency of such contract as evidence see sec. 438, *infra*.)

Performance.

Sec. 199. Performance of the contract is a condition precedent to the right of the original contractor, or of subcontractors, materialmen or laborers, to enforce liens for their work and materials. (See secs. 72, 77, *supra*.)

A substantial performance of the contract is also by the statute made the event within a certain number of days after which claims of lien must be filed. This matter under the statutory name of "trivial imperfection" will be treated in a subsequent chapter to which it seems more properly to belong. (See sec. 283, *et seq.*, *infra*.)

Performance of the contract as a condition precedent to the right, in a personal action, to recover the contract price, will be considered in the chapter treating of "Personal Action." (See sec. 357, *infra*.)

It is proposed to present here only those matters which bear generally upon the subject of performance of the contract.

Performance generally.

Sec. 200. Where, by the terms of the contract, the third and last installments of payment for the work were conditioned upon its completion according to agreement and specifications, such installments cannot be recovered

where the whole work is consumed by fire, without apparent fault of either party, before its completion. (*Clark v. Collier*, 100 Cal. 256, 34 P. 677; *S. M. Perry Co. v. Jones*, Superior Court of L. A. Co., Judge Shaw, 1893.)

Where a mechanic, engaged by the day to erect a building, under the control of the owner, is discharged by him when the work was on the verge of full and actual completion, the owner undertaking to finish it, such discharge is equivalent to an acceptance of the work as a completed contract for the erection of the building. (*Ward v. Crane*, 118 Cal. 676, 50 P. 839.)

Where a building contractor has proceeded to construct the building of the material and in the manner substantially as provided for in the contract, save as changed by orders of the superintendent of the owner, and the owner, before completion of the contract, without cause, and in violation of the contract, took possession of the building, ousted the contractor therefrom, and refused to permit him to complete the building according to the contract, and appropriated to his own use the material on hand and provided to be used for its construction, the contractor is entitled to treat such contract as rescinded, and to recover the reasonable value of the work performed and materials furnished at the request of the owner. (*Adams v. Burbank*, 103 Cal. 646, 37 P. 640.)

Where, as a part of the contract for the construction of a ditch, the contractors guarantee that a certain quantity of water should run through it for two years, such guaranty is in the nature of a warranty for which the owners took the responsibility of the contractors and the latter are not required to wait for two years and then show that the ditch had carried all the water at all times, to entitle them to recover from the owner the agreed compensation for the construction of the ditch. (*Gilliam v. Brown*, 116 Cal. 454, 48 P. 486.)

Substantial performance.

Sec. 201. What is a substantial performance of the contract is a question of fact, to be determined from the facts and circumstances of the case. (*Harlan v. Stufflebeem*, 87 Cal. 508, 25 P. 686.)

In a contract for painting, graining and varnishing a building, the fact that some small places in the building were not properly grained and finished the cost of which is not more than five dollars, is not inconsistent with a finding that the contract was substantially performed. (*Harlan v. Stufflebeem*, *supra*; see sec. 286, *et seq.*, *infra*.)

Where the findings show an intentional departure of the builder from the contract, and indicate an attempted fraud on his part, there can be no substantial performance of the contract; nor does the finding that the difference between the value of the house as actually constructed and as it should have been constructed was only three hundred and fifty dollars tend to show that the contract had been substantially performed. The owner has a right to have built the structure contracted for, and to have his plans substantially embodied in the work, regardless of whether his caprices expressed in the contract would have added to the value of the structure or lessened its value. In order that the contractor may recover the contract price, less damages caused by the failure to perform the contract, there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith, and whether these facts exist is a matter to be determined by the jury or the court sitting as jury, and substantial performance must be found as a fact. (*Perry v. Quackenbush*, 105 Cal. 299, 38 P. 740.)

So, where the contract called for lathes one and one-quarter inches wide, and lathes one and one-half inches wide were used, and the contract called for No. 1 rustic and the best quality of joists and studding, and the contractor

used second quality of joist and studding and No. 2 rustic, there is a substantial and material departure from the specifications of the contract. (*Golden Gate L. Co. v. Sahrbracher*, 105 Cal. 114, 38 P. 635; destruction of building, by fire before completion, see *Clark v. Collier*, 100 Cal. 256, 34 P. 677.)

Abandonment. Generally.

Sec. 202. A conveyance of the property by the owner with whom the contract is made, is not in itself an abandonment where it does not appear that the owner's grantee has or has not completed or abandoned the construction of the building. (*Cohn v. Wright*, 89 Cal. 86; 26 P 643.)

Non-payment of an installment of the contract price when it is due is such a breach of the contract as to justify a contractor in leaving the work. (*Golden Gate L. Co. v. Sahrbracher*, 105 Cal. 114, 38 P. 635; *Porter v. Arrowhead R. Co.*, 100 Cal. 500, 35 P. 146; *S. F. Bridge Co. v. Dunbarton L. etc. Co.*, 119 Cal. 272, 51 P. 335; see *Cox v. Railroad*, 52 Cal. 590, s. c. 54 Cal. 605, 63 Cal. 197.)

But not if the contractor has not performed the contract according to its terms when he demands payment of the installment. (*Golden Gate L. Co. v. Sahrbracher*, *supra*.)

If the contractor leaves the work without cause, it is an abandonment of the contract such as is contemplated by section 1200 of the C.C.P., and the rights of the materialmen and subcontractors will be measured by the provisions of that section. (*Golden Gate L. Co. v. Sahrbracher*, *supra*; see sec. 311, *infra*.)

If the owner prevents the completion of the contract, the contractor is justified in abandoning it, and he may recover a fair compensation for the work performed (*Cox v. Railroad*, 47 Cal. 87,) and he may prosecute his action for a breach and recover all the benefits he would have received upon full performance. (*Cox v. Railroad*, 54 Cal. 605, s. c. 52 Cal. 590, 63 Cal. 197.)

Construction of contract. Arbitration.

Sec. 203. It now seems to be the settled law that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine a dispute between parties, notwithstanding such agreement. But when the agreement is, that the covenantor shall pay such sum and only such sum, as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action as if the parties had expressly so provided. It was so held with reference to a contract for the construction of a building, in which it was agreed, that, should any dispute arise regarding the value of extra work, the same should be valued by arbitrators.

The distinction between the two classes of cases is, that in the former the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences, to the exclusion of the courts; and in the latter, they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained; and this is made a condition precedent, either in terms or by necessary implication. (*Holmes v. Richet*, 56 Cal. 307; see *McFadden v. O'Donnell*, 18 Cal. 160.)

Bond must be filed with contract or memorandum thereof. The statute.

Sec. 204. Section 1203 of the C.C.P. is as follows:

"Every contract required to be filed under the provisions of this chapter [sections 1183-1203] shall be accompanied by a good and sufficient bond in an amount equal to at least twenty-five per cent. of the contract price, which said bond shall be filed at the same time and in the same manner as herein provided for the filing of such contract, or memorandum thereof. Said bond shall, by its terms, be

made to inure to the benefit of any and all persons who perform labor for, or furnish materials to the contractor, or any person acting for him, or by his authority, and any such person shall have an action to recover upon said bond, against the principal and sureties, or either of them, for the value of such labor or materials, or both, not exceeding the amount of the bond; but such action shall not affect his lien, nor any action to foreclose the same except that there shall be but one satisfaction of his lien, with costs and counsel fees. Any failure to comply with the provisions of this section shall render the owner and contractor jointly and severally liable in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by said contract."

Section 1203 as originally enacted in 1885 (stat. 1885, 147) did not require a bond to accompany and be filed with the contract. That section provided that if a bond was given by the contractor to the owner for the faithful performance of his contract, it should inure to any person who performed labor or furnished materials to the contractor. No penalty was imposed for the failure to give or to file such bond. This section was repealed in 1887. (Stat. 1887, 155; see sec. 21, *supra*.)

The contractor under contract with a public corporation to do certain public work, and also under contract with municipalities to construct sewers, etc., is required to give bond for the benefit of laborers and others. For the acts requiring these bonds, see secs. 22 and 22a, *supra*.

The bond. Generally.

Sec. 205. All or any of the obligors upon a joint and several bond may be included in the same action at the option of the obligee and the building contract referred to in the bond is admissible in evidence against the sureties. (Kurtz v. Forquer, 94 Cal. 91, 29 P. 413.)

The failure to file the bond required by section 1203 does not affect the validity of the building contract. Such failure renders the owner and the contractor "jointly and severally liable in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by said contract." (*Clinton v. Pooley*, Superior Court of L. A. Co., 1897, Judge York.)

Where the sureties upon a bond given by the contractor to the owner, sold and delivered lumber to the contractor and claimed a lien upon the building for the purchase price, a note given to them by the owner of the building in consideration of the cancellation of such lien is without any legal consideration to support it, and in such case the owner should be permitted to interpose the sureties' liability upon the bond as a defense to the action brought by the sureties upon the note. (*Blyth v. Robinson*, 104 Cal. 239, 37 P. 904.)

In an action upon the bond it is a material issue whether the surety had seasonable notice of the action to foreclose the liens and whether such action was properly defended and where such issue is raised by the pleadings, it is error to fail to find upon that issue. (*Ernst v. Cummings*, 55 Cal. 179.)

Where the condition of the bond is that the owner shall give written notice of his intention to proceed with and complete the work to be done under the contract, an allegation in the complaint, in a suit upon the bond, that notice was given is not sufficient. The allegations of the complaint must meet the requirements of the bond and allege that written notice was given, the rule applicable to contracts generally that where a notice is alleged it will be presumed that it was in writing, has no application. (*Lott v. Corwin*, Superior Court of L. A. Co., Judge Shaw, 1896.)

Where a bond is given for the benefit of a number of persons whose claims are several, the one who first begins

suit on the bond requires thereby a prior right to payment. One who sues subsequently can claim only the surplus of the penalty that may remain after satisfying the demand of the first suitor. (*Williams v. Dodge*, Superior Court of L. A. Co., 1896, Judge Shaw.)

Statutory essentials of bond.

Sec. 205 a. Section 1203 provides that the amount of the bond shall be equal at least to twenty-five per cent. of the contract price. This section fixes the minimum amount of the bond required, but there is nothing in it which prevents the parties from giving a bond whose penalty exceeds twenty-five per cent. of the contract price.

The bond required is a "good and sufficient bond." The necessity for, and the number of sureties upon, the bond are left to implication. The bond referred to, as clearly appears from the statute, is an indemnity bond, and and from the use of the words "sureties," the natural inference is that at least two sureties are required.

This section provides that the bond shall be made to inure to the benefit of any and all persons who perform labor for, or furnish materials to the contractor and the other persons therein named. The particular form of the bond would seem to be immaterial so long as it is expressly made to inure to the benefit of the persons named. The bond, therefore, may be made to run to the state of California for the use and benefit of the persons named in the statute, or it may be made to run directly to such persons, following, of course, the language of the statute. Both of these forms are in common use.

The Bond. Execution of.

Sec. 206. A joint and several bonds, condition for the faithful performance, by the principals named therein, of a building contract with the obligee, purporting to be the

bond both of the principals and of the sureties, but signed by the sureties only, is not rendered invalid as against them by the omission of the principals to sign, they being already bound by the contract referred to in the bond, and the bond having been delivered by the sureties to the obligee without the signatures of the principals. (*Kurtz v. Forquer*, 94 Cal. 91, 29 P. 413.)

Where a bond is in form joint and several, the failure of all the parties named in the instrument as obligors to sign the bond does not render it void. (*Stimson M. Co. v. Riley*, 42 P. 1072.)

The bond. Liability and discharge of sureties.

Sec. 207. Sureties upon a bond given under section 1203 are liable to materialmen and laborers notwithstanding they are not entitled to enforce liens against the property of a public corporation for the construction of which they have furnished labor and materials. (*Sansome v. Klock*, Superior Court of L. A. Co., 1897, Judge Allen.)

Where a contractor gave a bond to the owner of a building to indemnify him against any claims of liens for materials or labor, which bond referred to the original contract as the inducement or consideration for its execution, and by the terms of the building contract the owner was authorized to retain one-fourth of the contract price until final settlement between the parties as additional security against liens upon the building, the sureties on the contractor's bond have a right to look to such additional security as a special fund for their indemnity, and it is the duty of the owner to apply it in payment of liens instead of paying it to the contractor; and if he discharges liens after having paid to the contractor the full contract price, the sureties on the contractor's bond are discharged, and are not liable for the amount of such liens paid in excess of the contract price without their knowledge or consent. (*Kiessig v. Allspaugh*, 91 Cal. 231, 27 P. 655.)

The failure of the owner of the property to record the building contract does not have the effect to increase the obligation assumed by the sureties for the principal obligors named in the bond so as to operate as a release of the sureties in the absence of a stipulation in the bond providing that the contract should be filed as a condition precedent to the liability of the sureties. (*Kiessig v. Allspaugh*, 99 Cal. 452, 34 P. 106., see sec. 209, *infra*.)

Where the sureties upon the bond given by the contractor, sold and delivered lumber to the contractor, and claimed a lien upon the building for the purchase price, a note given to them by the owner of the building, in consideration of the cancellation of such lien, is without any legal consideration to support it, but the sureties are not released from their obligation by the mere execution of the note, nor is the obligation of the bond destroyed thereby when the note was given under the mistaken belief that the bond executed was void for want of proper recordation of the contract. (*Blyth v. Robinson*, 104 Cal. 239, 37 P. 904; for estoppel and pleading, see *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890.)

The bond. Liability and discharge of sureties continued.

Sec. 208. Where a bond stipulates that the contractor shall pay all claims for labor and materials and where also, the contract provides that the contractor shall cancel and release the building and premises from all claims, and lien-claimants present their claims for labor and materials to the owner, within the time provided by the statute for filing claims of lien, and threaten to file them against the building, the owner has the right to protect himself against the filing of such claims by paying them, and the sureties upon the bond are liable to him for such payments. In such case, of course, the owner must assume the burden of proving not only that the claims were valid but also that they could be made the subjects of lien and that it was reasonably certain that the claims would have been filed. (*Lott v. Corwin*, Superior Court of L. A. Co., Judge Shaw, 1896.)

So where a materialman files his claim of lien for materials furnished by him to the contractor and which were used by the latter in the construction of the owner's

building, and thereafter releases the lien upon part payment of his claim, the sureties upon the bond of the contractor given under section 1203, are not liable to the lien-claimant for that part of the claim not paid, for it must be presumed that if the lien-claimant had foreclosed his lien instead of releasing it, he could have recovered the full amount of his claim, since the contract price was \$6200 and a final payment of \$1550 (which was largely in excess of the amount of the claim) was, by the terms of the contract, reserved for thirty-five days after the completion of the contract. The rule in equity is that where a creditor, having a bond with sureties and also a lien upon property of the principal debtor, releases his lien, he thereby releases the sureties upon the bond. (*Arcade M. Co. v. Dolsen*, Superior Court of L. A. Co., 1896, Judge Shaw.)

And the same rule applies where after materials have been delivered, the terms of the contract for the purchase thereof, are changed by extending the time of payment therefor. (*J. D. Hooker Co. v. General Construction Co.*, Superior Court of L. A. Co. 1897, Judge Shaw.)

Where the contractor abandons the contract which is void because of failure to file it, and one of the sureties on the contractor's bond voluntarily completes the contract by constructing the building called for by such contract, at a cost in excess of the contract price, such surety cannot recover from his co-surety one-half of such excess. The doctrine of subrogation applies only to those acts which a party is legally obligated to perform. Under the bond in question the sureties obligated themselves only to pay damages. The surety who completed the building was a mere volunteer. (*Dodge v. Kemple*, Superior Court of L. A. Co., 1897, Judge Clark.)

Void. Building contract. Effect on bond.

Sec. 209-210. The rule was laid down in *Schallert-Ganahl L. Co. v. Neal*, 90 Cal. 213, 27 P. 192, that where a contract for the erection of a building was void for failure to file the same, and other defects, a bond attached to the contract, conditioned that the contractor should perform the stipulations, acts, etc., of such contract, and not permit any claim, debt, or lien to be placed upon the building in the erection thereof, was also void, and did not constitute an estoppel as against a surety thereon who sought to foreclose a lien upon the building for materials furnished by

him to be used, and which were used in its construction.

The decision in the last case was disapproved in *Kiessig v. Allspaugh*, 99 Cal. 452, 34 P. 106. In the latter case it was held that the building contractor's bond there under consideration was so far an independent undertaking that the right to enforce it did not depend upon the subsequent or continued validity of the building contract, and that the sureties were liable upon the bond although the original contract was rendered wholly void because it was not filed for record as required by law. (See *Blyth v. Robinson*, 104 Cal. 239, 37 P. 904; *McMenomy v. White*, 115 Cal. 339, 47 P. 109; *Kiessig v. Allspaugh*, 91 Cal. 234, 27 P. 662; *Summerton v. Hanson*, 117 Cal. 252, 49 P. 135.)

In *Kiessig v. Allspaugh*, 99 Cal. 452, *supra*, the condition of the bond was to save and hold harmless the owner against any claims, demands or liens of all characters whatsoever for material or labor expended or used in the building, constructing and finishing of the said house. The bond in this case, therefore, was not made to depend upon the validity of the building contract, and for this reason is clearly distinguishable from the *Neal* case. Notwithstanding the criticism of the *Neal* case in the latter decisions, it is believed that case was correctly decided and that the true test of the validity of the bond is not whether the building contract is void, but rather, whether the bond, by its terms, is conditioned upon the existence of a valid building contract. If, for instance, the condition of the bond is that the contractor shall faithfully perform the building contract, and the contract is void, the bond must fall, because such condition is a vital essential of a valid conditional bond, and, in such case, there is no condition to be performed.

But, if the condition of the bond is that the contractor shall erect a building according to the plans and specifications mentioned in the contract, and pay all claims for labor, etc., on account thereof, or upon any other condition requiring the performance of specified acts, the condition is good irrespective of the validity of the building contract. In other words, by proper reference, the terms of the building contract may become a part of the bond which, in such case, would be an independent undertaking, and therefore valid.

CHAPTER IX.

THE CLAIM OF LIEN.

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The Statute.

Sec. 211. Section 1187, *inter alia*, provides:

Every original contractor, [a, 97] at any time after the completion of his contract, and until the expiration of sixty days after the filing of said notice of completion or notice of cessation of labor by the owner, and every person, save the original contractor, claiming the benefit of this chapter, at any time after the completion of any building, improvement or structure, or of the alteration, [87] addition to [87], or repair thereof, and until the expiration of thirty days after the filing of said notice of completion or cessation, by said owner, or within thirty days after the performance of any labor in any mining claim, must [97] file [73-4] for record [73-4] with the county recorder of the county, or city and county, in which such property or some part thereof is situated, a claim containing

1 a statement of his demand, after deducting all just credits and offsets,

2 with the name of the owner or reputed owner, if known, and also

3 the name of the person by whom he was employed, or to whom he furnished the materials, with

4 a statement of the terms, time given, and conditions of his contract, and also

5 a description of the property to be charged with the lien, sufficient for identification which claim must be

6 verified by the oath of himself or of some other person [b, 97];

provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration [87] addition to [87], or repair thereof [97]. * * *

(See sec. 5, *supra*, for section 1187 in full, amendments thereto, notes thereon and explanation of figures and brackets and also for the provisions of this section with reference to notice of completion or of cessation. For rules of construction of these statutory provisions, see secs. 30 and 31, *supra*.)

Contents of claim of lien. History of legislation.

Sec. 212. Section 7 of the Lien Act of 1850 (stat. 1850, 211, 1850-3, 810) provided that the lien-claimant should file for record, in the county where the building or wharf was situated, within the time therein specified, "notice of his intention to hold a lien upon the property declared by this act liable to such lien, for the amount due, or to become due, specifically setting forth the amount claimed."

Under the Lien Acts of 1855 (stat. 1855, 157,) of 1856 (stat. 1856, 203,) and of 1858 (stat. 1858, 225,) it was necessary to set forth in the claim of lien only "a just and true account of the demand, after deducting all proper credits and offsets" and under the act of 1862 "the nature and extent of his claim * * * over and above all payments and offsets." (Stat. 1862, 384.)

Nothing whatever was said in these acts concerning the name of the owner, or of the reputed owner; the name of the employer or of the person to whom the materials were furnished; or of the terms, time given and conditions of the contract. These acts, however, required the claim, or notice as it was sometimes called, to contain a description of the property sufficient for identification; a statement that a lien was claimed and, to be verified by the oath of the claimant, or by some other person in his behalf.

The act of 1868 (stat. 1868, 589) was the first to enlarge upon the required statements in the claim of lien. This act made it necessary to state the name of the owner, or of the reputed owner, the name of the person by whom claimant was employed, or to whom he furnished materials, and re-enacted, in substance, the provisions of the former acts that the claim should contain a *statement of the demand* after deducting all just credits and offsets, a description of the property to be charged with the lien sufficient for identification, and be verified by the oath of the claimant, or of some other person.

Section 1187, as enacted upon the adoption of the Code Civil Procedure in 1872, re-enacted the provisions of the act of 1868 and added the further provision that the claim should contain a statement of the "terms, time given and conditions of his contract."

No amendments with reference to the contents of the claim of lien have been made since 1872.

Meaning of statement of demand.

Sec. 213. Section 1187 treats both of the contents of the claim of lien and of the time within which, and the place where, it must be filed. It is proposed in the present chapter to follow this division of the subject and to present it in the order named.

This section expressly states the matters which the claim of lien shall set forth and if apt language had been used by the legislature, no difficulties would be encountered in determining what statements are required. As the statute stands, however, its scope is obscure, and the real intention of the legislature can only be guessed at by keeping in mind the objects to be accomplished by the statute and the persons for whose benefit it was enacted.

Section 1187 provides that the claimant must set forth in his claim of lien "a statement of his demand." What is the meaning of "statement of his demand" as thus used? Does it mean that the lien-claimant must set forth "a statement of his demand" with all the technicality and nicety required by a pleader in setting forth a cause of action based upon a claim or demand, or, are the requirements of the statute fulfilled by a general statement of the "demand," and if so, in what sense is the word "demand" used in the statute.

It will throw some light upon these questions by bearing in mind that the other and following provisions of the same section require statements of particular facts in the claim.

These are, (1) the name of the owner or reputed owner, if known; (2) the name of the person by whom the claimant was employed, or to whom he furnished materials; (3) the terms, time given and conditions of his contract; and (4) a description of the property to be charged with the lien.

It should be observed also that the statements in the claim are for the purpose of furnishing information. The only facts in addition to those expressly required by the statute to be set forth in the claim, either for the information of the public generally, or of the owner specially, are the amount and the nature of the demand. (*Wagner v. Hansen*, 103 Cal. 104, 37 P. 195.)

Statement of demand. Meaning of, continued.

Sec. 214. Interpreting the statute, therefore, in the light of the objects sought to be accomplished by it, "demand," as used in section 1187 means, first, the contract price due for work or materials, or for both, upon an express contract therefor, after deducting all just credits and offsets, or the value of the work or the materials, or of both, furnished under a void original contract (*Brigham v. Knox*, 59 P. 198), or under an implied contract to pay the reasonable value thereof, less all just credits and offsets,—and falls with the definition of an "amount claimed to be due."

That this is the true signification of the word admits of no doubt. The statute requires a statement of the "demand," *after deducting all just credits and offsets*. If "demand" does not mean "amount claimed to be due," then the phrase "after deducting all just credits and offsets," is meaningless. "Credits and offsets," *amount* to a certain sum, and this *amount* can only be *deducted* from another *amount* or sum. The statement of the "demand" must, therefore, be a statement of an *amount*.

The statement of the demand should not be confounded with the statement of the terms, time given and conditions of the contract. The statute requires both, and its require-

ments are not fulfilled unless both are stated in the claim of lien. The demand, however, arises out of the contract, upon the performance of it by the lien-claimant. To state the demand, therefore, is to state that the lien-claimant has performed labor or furnished materials called for by, and under and in pursuance of the contract.

If the contract, therefore, is one for the performance of labor, or for the furnishing of materials, or for both, the statement of the demand arising out of such contract is a statement that the claimant has performed the labor or furnished the materials, or both, setting forth the kind and price or value of labor performed, and the character and price or value of materials furnished, and where the demand includes both labor and materials and a separate price is fixed for each by the contract, or a lien is claimed for the value thereof, it would seem to be necessary to state separately the amount due for the labor and the materials. (See *Wagner v. Hansen*, 103 Cal. 104, 107, 37 P. 195; also authorities in the next section.)

The statute gives liens for materials and labor only when furnished for particular objects. (See chap. V, *supra*.) It would seem, therefore, that it is necessary to set forth in the claim of lien that the work or labor was done or the materials were furnished for one of these objects. (See *Ward v. Crane*, 118 Cal. 676, 50 P. 839.)

Statement of demand. The decisions.

Sec. 215. As we have just seen (sec. 212 *supra*) the lien acts of 1855, 1856 and 1858, required the claim of lien to contain "a just and true account of the demand" due the claimant "after deducting all proper credits and offsets."

Under these acts, or rather under the act of 1858, a lien-claimant stated in his claim of lien the amount due him, after deducting all proper credits and offsets, and that his

claim was for labor and materials, and it was held that these were sufficient statements of the account of the demand, the court saying:

"It was not necessary to set out the items of the account. Nothing more is required than a statement of the demand, showing its nature and character and the amount due and owing thereon."

(*Brennan v. Swasey*, 16 Cal. 141; see also *Heston v. Martin*, 11 Cal. 42.)

In *Selden v. Meeks*, 17 Cal. 129, under the same statute and upon a claim of lien containing the same statements, it was again held that the claim need not set out the items of the account and that nothing more was required than a statement of the demand showing its amount and character.

In *Davis v. Livingston*, 29 Cal. 283, the notice (claim of lien) there held sufficient, called the second notice, set forth that the claimant had furnished materials for the construction of the building of the owner and the amount due over and above all payments and offsets.

Statement of demand. The decisions.

Sec. 216. The foregoing decisions are all based upon statutes as they existed prior to 1868, but there is nothing in subsequent statutes to indicate that the legislature intended, by its use in section 1187, to give to the word "demand" a meaning different from that which it had in the former statutes as construed by the decisions just reviewed. The present law has been evolved from the earlier statutes and the provision that the claim of lien shall contain a statement of the "demand" was taken bodily from them. The word "demand" at such time had already received judicial construction. Its use, therefore, in the present statute amounts to a legislative adoption of the known construction of the word. (See *Baker v. Hamilton*, 55 Cal. 302; *Hyatt v. Allen*, 54 Cal. 353.)

But notwithstanding this rule of statutory construction, the Supreme Court in *Jewell v. McKay*, 82 Cal. 144, 23 P.

139, quoted with approval the construction put upon the word "demand" by the foregoing decisions and applied the rule to matters arising under the present law and held that it was not necessary, in a statement of the "demand," to set forth items of the account.

And in *Germania etc. Ass'n v. Wagner*, 61 Cal. 349, a claim of lien which set forth that the claimant claimed a lien, etc., for material furnished, etc.; that said material was furnished between certain dates, and that "the following is a true statement of our demand: Amount of bill for materials furnished between dates aforesaid—total \$1590.20, credits—total credits and offsets on bill, \$655.50," and giving the balance due and unpaid, was held sufficiently to set forth the quantity and character of the material furnished.

A statement in a claim of lien of the agreed price for the materials furnished under a void original contract, is a sufficient showing, *prima facie*, and statement of their value. (*Brigham v. Knox*, 59 P. 198.)

Credits and offsets. Failure to comply with statute invalidates claim.

Sec. 217. Section 1187 requires a statement of the demand "after deducting all just credits and offsets." This provision is precise and imperative and must be complied with before a lien can attach. The omission to state that the amount of the demand is due without also stating "after deducting all just credits and offsets," invalidates the claim. (*Davis v. Livingston*, 29 Cal. 283.)

In *Davis v. Livingston*, *supra*, the court say:

"The statement prescribed [by the statute] is a statement of claims as affected by payments and offsets, and there is nothing in the notice given by Davis [laborer and materialman] bearing either directly or indirectly upon that point."

The court further held that the failure of the employers, owners, to object to the notice or to return it, was not a waiver of the defect in it as the notice was *in invitum*, looking to an attachment under a statute and that the question was not what the employers failed to do but rather as to what the lien-claimants did.

Credits and offsets. Substantial compliance with statute required.

Sec. 218. The rule laid down in the last section was that a failure to state that the demand was due "after deducting all just credits and offsets" invalidated the claim. It is not meant by this rule, however, that the exact language of the statute must be followed. Any words equivalent in meaning to "credits and offsets" are sufficient to satisfy the requirements of the statute. A substantial compliance only is required. (*Preston v. Sonora Lodge*, 39 Cal. 116.)

In the last case the words "payments and offsets" were used in the claim instead of the words of the statute "credits and offsets," and the court said:

We think the words "payments and offsets" are substantially equivalent to the words "credits and offsets" in meaning and that the (claimant) ought not to be deprived of his lien upon a philological criticism of so flimsy a character."

Where a claim of lien states the balance as a certain sum "in gold coin of the United States," it is not open to the objection that it does not state the amount of claimant's demand after deducting all just credits and offsets, because of the quoted words. (*Neihaus v. Morgan*, 45 P. 255.)

Lien filed for too much. Recovery limited to amount stated.

Sec. 219. Under the statute, as we have seen, the claim of lien must state the amount due after deducting all just credits and offsets. Mistakes in the amount, however, are apt to occur. There may be an honest dispute as to

the amount or the balance due. In such case a misstatement of the exact amount due, if not fraudulently or wilfully made, will not invalidate the claim. (*Barber v. Reynolds*, 44 Cal. 519, 533.) And no reason is perceived why, in case of a dispute as to the amount due, if the statement of the amount is honestly made, the same rule should not apply. (See *Harmon v. Railroad*, 86 Cal. 617, 25 P. 124; s. c. 22 P. 407, 23 P. 1025.)

A claim filed for too much will not vitiate the lien for the amount actually due. (*Malone v. Big Flat etc. Co.*, 76 Cal. 578, 18 P. 772.)

We have just seen that a claim filed for too much is not, for that reason, invalid. Nor is a claim filed for too little invalid. In the former case the recovery is limited to the amount actually due, but in the latter, no recovery can be had for an amount in excess of that claimed in the lien whether or not the amount claimed is less than actually due. (*Goss v. Strelitz*, 54 Cal. 640.)

Name of owner or reputed owner. Name of owner at time of filing claims must be stated.

Sec. 220. Section 1187 expressly requires the claim of lien to state "the name of the owner or reputed owner, if known."

This is one of the material and essential statements in the claim and if omitted therefrom invalidates it. (*Hicks v. Murray*, 43 Cal. 515; *Phelps v. Mining Co.*, 49 Cal. 337.)

There may be a transfer of the property sought to be charged with the lien during the construction of the building or other structure or improvement. The statute, it will be observed, does not specify, in such case, which person—the grantor or the grantee—the person who owned the property at the time of the performance of the work or of the furnishing the materials, or the person who owned the property at the time of the filing of the claim—shall be named in the claim as the owner or reputed owner.

This question arose in *Corbet v. Chambers*, 109 Cal. 178, 41 P. 873, where, in holding that the statute required the statement of the name of the owner or reputed owner at the time of the filing of the claim, the court, at page 182, say:

“As the main object of giving personal notice of the claim to the owner of the building (as required in former statutes) is to affect him with notice of the lien and afford him an opportunity of protecting himself against the same in his dealings with the original contractor, it must be assumed that when the legislature substituted the recording of the claim, with the name of the owner therein, for the personal notice previously required to be given to him, it intended the owner of the property who would be affected by the lien, rather than a prior owner who had authorized the improvement, and who by an intervening sale had ceased to have any interest in the property or in any lien thereon.”

The court also say that another object in having the claim made a matter of public record is for the protection of those who deal with the owner of the property, the statute requiring the county recorder to keep an index of notices of mechanics' liens, and that unless the name of the owner at the time of the filing of the claim was stated in the claim, and that name entered in the index of notices of lien, subsequent purchasers would have no notice.

Name of owner or reputed owner. Statement required if name not known.

Sec. 221. The statute does not, in every case, require the statement of the name of the owner or reputed owner. It provides that the name of the owner or reputed owner must be stated “if known.” It follows, therefore, that if the name is not known to the claimant, he need not, as he cannot, state it in his claim, and that his claim is not, for this reason, invalidated.

Where, therefore, a claim of lien states that N is the owner of a certain house for the construction of which the

claimant furnished materials; that N is the reputed owner of a leasehold interest in the realty, and that the owner of the fee to the realty is unknown, it meets the requirements of the statute and is sufficient. (*West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 P. 231.)

In this case the court, at page 277, say:

“The plaintiff (claimant) is only required to state the names mentioned, if known. If the names mentioned are not known, the claim filed is sufficient if it is *silent* on this subject.”

The statement by the court in the last case, that if the name be unknown the claim is sufficient if it is silent on the subject, was unnecessary to the decision of that case, since it was stated in the claim there under consideration (p. 276) that the name was unknown, and the rule laid down is not in accordance with other decisions of the court.

In *Corbett v. Chambers*, 109 Cal. 178, 184, 41 P. 873, it is said that if the claimant does not know the name of the owner, he may state this fact and perfect his lien without naming an owner, and in *Hooper v. Flood*, 54 Cal. 218, a claim which stated neither the name of the owner, nor that the name of the owner was unknown to the claimant, was held bad.

Analogous to the above is that of a case where materials were furnished for a building erected by two tenants upon leased grounds. A claim of lien was filed against both tenants as partners. It appeared, however, that the original charge for the materials was made against one of them, the claimant not knowing at the time of making the charge that the other tenant was interested in the building, but learned the facts before filing the lien, and it was held that the claim of lien was not invalid. (*West Coast L. Co. v. Apfield*, 86 Cal. 336, 24 P. 993, s. c. 22 P. 231.)

Name of owner or reputed owner. May be stated conjunctively or in the alternative.

Sec. 222. The statute requires a statement of the name of the owner *or* reputed owner. The same person, however, may be both owner *and* reputed owner, and in such case a statement that a person is the owner *and* the reputed owner is sufficient. (*Arata v. Tellurium etc. Co.*, 65 Cal. 340, 4 P. 195.)

And where a claimant states in his claim that a certain person is owner *and* reputed owner of the premises, his lien is not impaired by proof that such person is the reputed owner only. (*Kelly v. Lemberger*, 46 P. 8.)

In *Corbett v. Chambers*, 109 Cal. 178, 41 P. 873, the claim of lien stated that a certain person was the "owner or reputed owner" of the property. The court in holding this statement sufficient to meet the requirements of the statute, at page 184, say:

"The terms of the section [1187] clearly indicate that it was not the intention of the legislature that in the claim of lien which he files for record, the claimant shall state the name of the real owner at the risk of losing his lien if it shall turn out that he was in error. The provision therein that the claimant shall give the 'name of the owner or reputed owner, if known,' implies that if he does not know the name of the owner, he may state this fact and perfect his lien without naming an owner * * * and also, that if, in good faith, he gives the name of a reputed owner, he shall not lose his lien if he shall afterward ascertain that some other person was the owner. * * * Under this view of the object of the section, it must be held that the claimant does not fail in perfecting his lien if, as in the present case, he states the name of the owner or reputed owner in the alternative." * * *

(See *Kelly v. Lemberger*, *supra*.)

Name of owner or reputed owner. What is not sufficient statement of.

Sec. 223. The statute would seem to require a positive statement of the name of the owner or reputed owner, or a statement of facts which shows clearly who is the owner or reputed owner.

In *Hooper v. Flood*, 54 Cal. 218, 222, the claim of lien stated in substance that James Irvine caused the buildings to be constructed, that the materials were furnished for him to be and were used in the construction of the buildings; and that it was the intention of the claimants to claim and hold liens upon the buildings on the land upon which they were erected, and upon such interest as James Irvine, who caused the buildings to be constructed, had therein and thereto on a certain date when the claimants commenced furnishing said materials.

The point was made that this claim did not state the name of the owner or reputed owner and the court, at page 223, in sustaining this point, say:

“Is that equivalent to the statement of the name of the owner or reputed owner of the property, or that the name of such owner or reputed owner is not known? We cannot so hold. Everything stated may be strictly true, and yet Irvine be neither the owner nor reputed owner of the premises upon which the buildings were erected. That it subsequently appeared in the case that he was the owner, cannot cure this defect in the claim filed for record. Upon a compliance with the law, and upon no other condition, is a lien given.”

Name of owner or reputed owner. What is sufficient statement of.

Sec. 224. In *Russ Lumber Co. v. Garrettson*, 87 Cal. 589, 25 P. 747, the claim of lien stated that G was the owner of a lot of land which was described, and that he entered into a contract with W and N by which they agreed to erect and

finish for him a building on the lot, and that the building was completed at a time named; that he furnished the materials under a contract with W and N by which they agreed to pay the market value thereof at date of delivery, in cash, stating the whole value and balance unpaid; that he, on a day named, duly gave written notice to G that he had agreed to furnish the materials as aforesaid, etc.

The court held the above a sufficient statement of the name of the owner of the building and at page 595, said:

"To say that the name of the owner of the building * * * * [is] of mere inference, since it does not necessarily follow that the owner of the land is the owner of the building * * * seems to us to be not even a plausible argument."

A claim of lien sufficiently states the name of the owner where it is set forth therein that K R and C were the names of the owners who held the legal title to the premises and that A was in possession and was the name of the reputed owner who had the equitable title. (*Harmon v. Ashmead*, 68 Cal. 321, 9 P. 183.)

In *Palmer v. Lavigne*, 104 Cal. 30, 32, 37 P. 775, language of the claim of lien was, after stating the manner and time of payment, the last of which it is averred was to be paid out of the wages of "John Lavigne, her husband, who was and still is the reputed owner of the said Lavigne Ranch." As to the building which was moved upon the ranch it was averred that the defendants "Mary C. and John E. Lavigne, are the reputed owners." It was held that the claim sufficiently showed the name of the owner or reputed owner to meet the requirements of the statute.

The statement required is one which shows whether the lien-claimant holds the property of the person whose name he states as the owner under a contract made with him, or on account of some interest which he has in the property. (*Palmer v. Lavigne*, *supra*.)

Name of employer and of person to whom materials were furnished. Generally.

Sec. 225. Section 1187 also provides that the lien-claimant must set forth in his claim of lien filed for record,

"the name of the person by whom he was employed, or to whom he furnished materials."

The failure to comply with this requirement of the statute renders the claim of lien invalid. (*Wood v. Wrede*, 46 Cal. 637; *Phelps v. Mining Co.* 49 Cal. 336; *Ascha v. Fitch*, 46 P. 298.)

And cannot be aided by allegations in the complaint for foreclosure of the lien which state the name of the person to whom the materials were furnished (*Madera F. Co. v. Kendall*, 120 Cal. 182, 52 P. 304;) and the same rule would apply to the name of the employer.

The fact that the original contract was void for want of record does not relieve the claimant from the necessity of stating the name of the person to whom the materials were furnished. (*Madera F. Co. v. Kendall*, *supra*.)

Where the contract is void because not filed for record, and materials have been furnished to the contractor, the claim should state that the materials were furnished to the contractor. (*Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860.)

If there are several contractors the claim of lien is sufficient if it states the name of one of them. (*Davis v. Livingston*, 29 Cal. 283, 289.)

A mistake in the use of the word "occupied" for "employed" will not invalidate the claim. (*McDonald v. Backus*, 45 Cal. 262, 264.)

Name of employer, etc. Partners. Firm name.

Sec. 226. The object of the statute in requiring the claim of lien to state the name of the employer and of the persons to whom the materials were furnished does not differ from that of the other provisions of section 1187 with

reference to the contents of the claim of lien. This object is to give notice of the claim to the owner and afford him an opportunity to protect himself against the same in his dealings with the original contractor, and also to give notice generally to all persons concerning the title to the property sought to be charged with the lien. (*Corbett v. Chambers*, 109 Cal. 178, 41 P. 873.)

In *Tibbets v. Moore*, 23 Cal. 208, the claim of lien stated that the lumber was furnished to Moore & Co., and it was objected that the lien could not be enforced against the property of Moore. But the court said the material facts to sustain the lien were that the materials were furnished for, and were actually used in the construction of the building on which the lien was claimed, and that whether the owner purchased the materials in his own name or in the name of a firm of which he was a member could make no difference so far as related to the lien.

So, in *McDonald v. Backus*, 45 Cal. 262, the claimant stated in his claim of lien that he had been employed by Swain, and did not state his employment to have been by E. Froment & Co., and it was contended that the claim was invalid because it did not state the name of the employer E. Froment & Co., and could not therefore be enforced against the property of the firm. In overruling this contention, the court, at page 265, say:

“If Swain, however, was a member of a business firm, and if his act in employing plaintiff would, in point of law, operate to bind his copartners, it would only result that the copartnership firm should be made defendants in the action” * * *

Name of Employer, etc. Statement of fact or conclusion of law.

Sec. 227. In *McDonald v. Backus*, cited in the last section, the claim stated that the claimant had been employed by Swain. The fact was that Swain did employ the claimant but that in employing the claimant he was acting as a partner of

the firm of E. Froment & Co., and therefore as a legal result, the employment was made by the firm. The claim of lien was objected to because it failed to state who, in law, employed the claimant but the objection was overruled, and it was held that the requirement of the statute in this respect was fulfilled by stating the name of the person who in fact made the employment. (See *McIntyre v. Trautner*, 63 Cal. 429.)

The claim of lien in *Malone v. Big Flat G. M. Co.*, 76, Cal. 578, 18 P. 772, stated that the claimant was employed by the Big Flat Gravel Mining Company, the owner, and it was contended that the claim of lien was invalid because it did not state who, in fact employed the claimant. The court in overruling this contention, at page 584, say :

“The case of *McDonald v. Backus* (*supra*) contains a statement * * * that the notice of lien is required to state facts, and not mere conclusions of law. This was said to show that a notice of lien was sufficient if it gave the name of one member of the firm by which the claimant was employed, omitting the other members, and not giving the firm name. Possibly that was correctly decided. We express no opinion as to it. But we think that the broad statement as to conclusions of law cannot be maintained. According to it, if the owner sends his office boy to order repairs upon a building, and the boy simply tells the laborer to make the repairs, without saying for whom, the notice of lien must give the name of the office boy as that of the person by whom he was employed * * *. In our opinion the intention was that the claimant should put enough in his notice of lien to enable the owner to understand whether the claimant was an original or a subcontractor; in other words, whether the claimant asserted that he contracted with the owner and had a personal claim against him or whether he contracted with the contractor, and looked only to him and the property * * *. But we should prefer not to lay down any rule about facts and conclusions of law.”

**Name of employer, etc. Agents. Surplusage.
Mistakes.**

Sec. 228. The failure to state in the claim of lien, any of the matters required by the statute, is fatal to the lien. But mere surplusage has no such effect.

In *McIntyre v. Trautner*, 63 Cal. 429, the claim of lien stated that one G S was the name of the contractor who "as such contractor and as agent for and on behalf of said Trautner [owner] entered into a contract with said McIntyre [claimant] under and by which," the work was done and the materials were furnished. It was held that the claim of lien was not vitiated by the words "as a contractor;" that those words were mere surplusage and did not detract from the effect of the statement that G S in employing the claimant acted as the agent of the owner.

A mistake in the christian name of the employer in the claim of lien, does not invalidate it. This defect may be cured by proper allegations in the complaint alleging that the claimant is the same person mentioned in the complaint, and especially where the employer was sometimes known by the name stated in the claim of lien. (*Jewell v. McKay*, 82 Cal. 144, 23 P. 139.)

So, where the claim of lien states that the materials were furnished to a contractor, naming him, the claimant may upon foreclosure of the lien aver facts showing that the contract with the owner is void and that he is deemed under the statute to have furnished the materials to the owner. (*Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860; *West Coast L. Co v. Knapp*, 122 Cal. 79, 54 P. 533.)

Name of employer, etc. What is sufficient statement of.

Sec. 229. The claim of lien in *Barilari v. Ferrea*, 59 Cal. 1, so far as material to the point under consideration, stated that G F and A F were the reputed owners of the premises and caused the buildings to be constructed, etc.;

that the said G F and A F on a certain day entered into a contract in writing under and by which the labor was performed and the materials were furnished, etc. This statement was held sufficient.

This requirement of the statute is satisfied if the statement in the claim of lien is sufficient to inform the owner whether the claimant was employed by or furnished materials to, the original contractor or the owner, that is, whether the claimant is an original contractor or a subcontractor. (*Malone v. Big Flat etc. Co.*, 76 Cal. 578, 18 P. 772.)

A claim of lien after describing the mining claim, stated that F was the owner of the claim, "the said lien being held and claimed for and on account of work and labor performed by me as a miner for said F on said mining claim," for a period definitely stated "under an agreement with said F," held that the claim stated by whom claimant was employed. (*Ascha v. Fitch*, 46 P. 298; see sec. 224, *supra*.)

Name of employer, etc. What is not sufficient statement of.

Sec. 230. The claim of lien in *Madera F. Co. v. Kendall*, 120 Cal. 182, 52 P. 304, after stating that plaintiff had furnished materials which were used in the construction of the building, continued:

"That William Price is the name of the contractor who on or about the first day of March, 1894, as such contractor and agent of the owner, B. F. Kendall entered into a verbal contract with said Madera Flume and Trading Company, a corporation, under and by which said William Price was to furnish the material for the construction of said building."

The court, page 183, say:

"In this statement the plaintiff does not state that it furnished any of these materials to William Price, nor does it state the name of the per-

son to whom it did furnish them. Not only does the statement fail to name the person to whom the materials were furnished by the plaintiff, but it is consistent with their having been furnished by it to some one other than Price, for whom he obtained them in fulfillment of his contract with Kendall."

Terms, time given and conditions of claimant's contract. Meaning of terms used.

Sec. 231. Section 1187 of the C.C.P. provides, that the claim of lien shall contain, *inter alia*, "a statement of the terms, time given and conditions of his contract."

This clause was introduced into section 1187 by the adoption in 1872 of the Code of Civil Procedure. (See sec. 5, *supra*, for this section in full, amendments thereto and notes thereon.)

Failure to comply with the provisions of this statute is fatal to the lien. (*Hooper v. Flood*, 54 Cal. 218.)

The contract, the terms, time given and conditions of which must be set forth in the claim of the lien, is the contract of the claimant and not the contract between the original contractor and the owner except in those cases where the original contractor is also the claimant. The statute requires the claimant to state in his claim, the terms, time given and conditions of *his* contract. (See *Gordon H. Co. v. R. R.*, 22 P. 406, overruled on other points, s. c. 86 Cal. 620, 25 P. 124.)

The "terms" of a contract in the common acceptance of that word as applied to contracts, mean the conditions, stipulations, covenants and obligations of the contract. (25 Am. & Eng. Ency. of Law, 952, 1st Ed.)

Bouvier in his law dictionary, defines "condition" as a clause in a contract or agreement which has for its object to suspend, rescind or modify the principal obligation, or in case of a will, to suspend, revoke or modify a devise or bequest. (See Civil Code sec. 1434, *et seq.*)

The words "time given" have been defined to mean the time of payment for the work and labor performed and materials furnished, as agreed on and expressed in the contract. (*Hills v. Ohlig*, 63 Cal. 104; *California Powder Works v. Blue Tent etc. Co.*, 22 P. 391.)

Statement of the date of the contract is immaterial except for the purpose of description and identity, the owner being entitled to have notice of the particular contract upon which the claimant intends to rely. But a mistake in the date where the contract is otherwise sufficiently identified, is not fatal. (*Pacific etc. Co. v. Fisher*, 109 Cal. 566, 568, 42 P. 154; *California Powder Works v. Blue Tent etc. Co. supra.*)

Terms, etc. of contract. Object of the statute.

Sec. 232. Under the lien law, when a claim of lien is filed against his property, it becomes the duty of the owner to protect himself against the claim by retaining sufficient of the contract price due to the original contractor to satisfy the claim and to discharge the lien, if valid, or if the claim is void, to protect himself against the original contractor by refusing to pay it.

The first duty of an owner is, therefore, to determine whether the claim of lien is valid, and if valid, whether the claim, according to the terms of claimant's contract, is due and payable.

The determination of these facts depends upon the validity of the claim of lien, both as to its contents and its form, and upon a compliance with the provisions of the lien law as to the time of filing the claim for record, as well, also, as upon the nature and character of the work claimed to have been done and the materials to have been furnished, that is, whether the labor and materials are such as entitle the claimant to a lien; and likewise upon the "terms, time given and conditions of the claimant's contract; for if, according to the terms, etc., of such contract there is

nothing due and payable though there may be something owing to the claimant; or, if the claimant has failed to perform his contract and is, therefore, not entitled to recover anything on the contract price against the original contractor, the claimant would not have a lienable demand and the payment of such demand by the owner would not be an offset against the original contractor on that contract price. (*First Nat. Bank v. Perris etc.*; Dist. 107 Cal.55, 40, P. 45; *Wagner v. Hansen*, 103 Cal. 104, 107, 37 P. 195; *Harmon v. Ashmead*, 60 Cal. 439.)

Terms, etc. of contract. Object of statute, continued.

Sec. 233. The necessity of setting forth the terms, time given and conditions of the contract in the claim of lien thus becomes apparent and the test of the sufficiency of the claim of lien is, in every case, whether or not the terms, etc., as set forth are sufficient to furnish the owner with information of all the essential and material terms, stipulations and conditions of the claimant's contract.

Where, however, the original contractor is the claimant, his claim of lien has been upheld, though the terms, time given and conditions of his contract have been stated in his claim of lien in very general terms and some of them omitted. The reason for this seeming partiality of construction in favor of the original contractor is found in the fact that the contract, the terms, etc., of which the statute requires to be stated in his claim of lien, is one between the lien-claimant and the owner and that, therefore, the owner must be presumed to have full knowledge of its terms, etc., whereas, no such presumption can arise where the claimant is a subcontractor, laborer or materialman. (*McGinty v. Morgan*, 122 Cal. 103, 51 P. 392; see *Wagner v. Hansen*, *supra*.)

This rule in favor of the original contractor has not been extended to subcontractors or to any other claimant who

has no contractual relations with the owner. The statute requires the terms, time given and conditions of the claimant's contract to be stated in his claim of lien. This necessarily means all of the express terms, etc., of the contract. The statute, however, does not require details; a general statement is sufficient (*Jewell v. McKay*, 82 Cal. 144, 23 P. 139; *McGinty v. Morgan*, *supra*.)

No hard and fast rule can be laid down by which to determine, in every case, whether or not the terms, etc. of the contract have been sufficiently stated in the claim of lien. Great care should be taken, however, that the terms, etc., of the contract are not only all stated in the claim of lien, but also that they are accurately stated. The contract set forth in the claim of lien is the contract upon which as its terms, stipulations and conditions are there stated, the claimant must stand for his right to enforce his lien against the property of the owner. The claim cannot be amended or reformed (sec. 255 *infra*.) and if, therefore, the contract stated in the claim varies in any material essential from that established by the evidence in the suit to foreclose the lien, such variance is fatal to the lien. (Chap. XV sec. 420 *infra*.; *Malone v. Mining Co.*, 76 Cal. 578, 581, 18 P. 772.)

Express terms of contract only need be stated.

Sec. 234. What has been said in the preceding sections of this chapter concerning the statement of the terms, time given and conditions of the claimant's contract, has been on the assumption that all of the terms of the contract have been expressly agreed upon by the parties. It is seldom, however, in contracts other than those between the original contractor and the owner, that all of the terms are expressly agreed upon by the parties. Cases are frequently met with in which the contract, as made between the parties, is a request to perform labor or to furnish materials on the one

side and the performance of the labor or the furnishing of the materials on the other. In such cases the amount or price to be paid and the time of payment are that amount and that time which the well established rules of law determine.

It is self-evident that the terms of the contract just stated with reference to amount and price and time of payment cannot be stated in the claim of lien as the terms of the contract agreed upon by the parties. In such case the law raises a promise on the part of the employer, or the person to whom the materials were furnished, to pay the reasonable value of the labor or of the materials, and while it would not invalidate the claim of lien to state in it that the agreement was, as implied by law, to pay the reasonable value of the labor or of the materials, such statement is unnecessary (*Reed v. Norton*, 90 Cal. 590, 597, 27 P. 426, s. c. 26 P. 767; *Jewell v. McKay*, 82 Cal. 144, 23 P. 139; *Hills v. Ohlig*, 63 Cal. 104; *Russ L. Co. v. Garrettson*, 87 Cal. 589, 27 P. 747), and as a rule inadvisable because a misstatement of the implied and material terms of the contract, in the claim of lien, is as fatal to the lien as the misstatement of the express and material terms of the contract.

The law requires a statement of the express terms of the contract only, and the lien-claimant who would improve upon the requirements of the law by anticipating its judgment upon disputed facts, does so at his peril.

Terms, etc. of contract. What is sufficient statement of.

Sec. 235. A claim of lien which states that the plaintiff was by the contract to perform the work and labor and furnish the materials for the alteration, construction and repair of a certain building; that plaintiff did perform the work and labor and furnish the materials for the purpose indicated; that it was agreed that he was to be paid for the same what they were reasonably worth, and that they were

reasonably worth a certain sum, sufficiently states the terms, time given and conditions of the contract where it appears that no time for the payment was agreed upon. (*Hills v. Ohlig*, 63 Cal. 104; see *Germania etc. Ass'n. v. Wagner*, 61 Cal. 349, for forms of claim held good.)

So another claim, which stated the kind and number of days of labor performed with the dates between which it was performed, the price agreed to be paid for the labor per day, with the aggregate amount then due, and that the terms of payment for the labor "were cash as soon as said labor was performed," substantially complied with the requirements of the statute as to the statement of the terms, time given and conditions of the contract. (*Tredinnick v. Mining Co.*, 72 Cal. 78, 13 P. 152; see *Ascha v. Fitch*, 46 P. 298.)

In another case the statement was that the claimant had furnished the materials under a contract with the contractors named, by which they agreed to pay the market value thereof at the date of delivery in cash, and stating the whole value of the materials furnished and balance unpaid, and it was held that the claim sufficiently showed the persons to whom the materials were furnished and the terms of the contract. (*Russ L. etc. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747.)

In *Cohn v. Wright*, 89 Cal. 86, 26 P. 643, a materialman stated, in his claim of lien, that the terms, time given and conditions of his contract were that it was "agreed that the price of all materials furnished by said firm of Cohn & Co. should be due on delivery of the same." This statement was held sufficient to meet the requirements of the statute.

Terms, etc. of contract. What is sufficient statement of.

Sec. 236. In *Snell v. Payne*, 115 Cal. 218, 46 P. 1069, the statement of a materialman in his claim of lien was that the materials were to be delivered in such quantities as might be directed during the progress of the construction

of the building, and that he was to be paid therefor on demand of payment as to each delivery of any quantity on said property by him, the reasonable market value thereof, and it was held that the claim sufficiently stated the terms, time given and conditions of the contract, and was not defective in not stating the time of payment.

Where a claim of lien for materials stated that the claimant undertook to furnish a certain named mining company explosives in such quantities as it might require, each parcel to be paid for at delivery, or as soon thereafter as might be, with interest upon such payments in case of delay, there was a sufficient statement of the terms, time given and conditions of the contract. (*California Powder Works v. Blue Tent etc. Co.*, 22 P. 391.)

So, where the claim stated that the price of the materials was "the usual price and what said materials were reasonably worth at their place of business," it states in legal effect a contract by the terms of which the materials were to be paid for on delivery at what they were reasonably worth. (*Reed v. Norton*, 90 Cal. 590, 27 P. 426, s. c. 26 P. 767.)

Terms, etc. of contract. Reference to original contract.

Sec. 237. A claim of lien may refer to the contract between the owner and the contractor for the terms of making payments to the materialman (claimant), when the payments to be made to the materialman become due according to his contract at the time the payments under the original contract become due to the contractor, and the claim of lien is not invalidated because it does not repeat the provisions of the original contract on that subject where the contract is for more than one thousand dollars, has been duly recorded and the terms of payment can be ascertained therefrom. (*San Diego L. Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431.)

The statement of the terms, time given and conditions of the contract in the claim of lien under consideration in *McGinty v. Morgan*, 122 Cal. 103, 54 P. 392, was "That said house was to be erected to consist of five rooms and to be finished in a workmanlike manner, for the agreed price of seven hundred and forty dollars." It was held that the claim was not rendered invalid because it omitted to state that the contract price was to be paid in installments (the contract having been made with the owner who was the claimant), it appearing that no other terms of the contract were made, that no time was given, that no conditions existed and that the claim stated the correct amount of the contract price and the amounts paid thereon which exceeded the installments.

Terms, etc. of contract. The Cash cases.

Sec. 238. In *Hooper v. Flood*, 54 Cal. 218, 221, the claim of lien stated that the terms, time given and conditions of the contract "are and were cash," and the point was made that this statement did not meet the requirements of the statute and the court in sustaining the point, at page 221, said:

" * * * Assuming that the contract in this case was of the most simple character, consisting of an agreement that one of the parties should furnish certain materials to be used in the construction of the buildings which were being erected upon the defendant's premises, and that the other should pay a stipulated price for said materials upon the delivery of them upon said premises, or elsewhere, would the word 'cash' indicate to a reasonable certainty that these were 'the terms, time given and conditions' of the contract? If a witness were asked to state before a court and jury 'the terms, time given and conditions' of such contract, would the answer 'cash' be considered satisfactory? It is conceded that if time had been given 'cash' would not be the appropriate word to express the

'terms, time given and conditions' of the contract. In that case the word 'credit' would throw just as much light upon the terms, time given and conditions of the contract as the word 'cash' does in this case. To hold that the statement in this case, in respect of the 'terms, time given and conditions of his contract,' is a compliance with the law, would be, in effect, to hold that a compliance with it, in this respect, is unnecessary. This we are not prepared to do."

In the last case the claim was held insufficient because the word "cash" standing alone did not mean anything and, therefore, was not a statement of the terms, time given and conditions of the contract.

In *Blackman v. Marsicano*, 61 Cal. 638, however, the statement was "cash upon demand, in gold coin of the United States," and it was held that this statement was a substantial compliance with the requirements of the statute, and the court say that the case of *Hooper v. Flood*, *supra*, presented a statement quite different in effect from that presented in *Blackman v. Marsicano*.

Following the last case is that of *Tredinnick v. Mining Co.*, 72 Cal. 78, 80, 13 P. 152, in which the statement of the terms, time given and conditions of the contract was "that the terms of the payment for said labor were cash, as soon as said labor was performed." The claim also stated the kind and number of days of labor performed, the dates between which it was performed, the price agreed to be paid therefor per day and the aggregate amount due. It was held that the claim sufficiently showed the terms, time given and conditions of the claimant's contract.

In *Kelley v. Plover*, 103 Cal. 35, 36, 36 P. 1020, the statement in the claim of lien was: "The following is a statement of the terms, time given and conditions of said contract, to wit: 50 M. 1½ laths, \$175," (stating each item of the claim.) "Terms cash on completion of contract."

The court after distinguishing the case from *Hooper v. Flood*, *supra*, say:

"But here the word 'cash' is followed by the words 'on completion of the contract;' so that the time and manner of payment are expressed; and it cannot be presumed, in the absence of allegation and proof that these did not include all the conditions of the contract." (See also *Hills v. Ohlig*, 63 Cal. 104; *Jewell v. McKay*, 82 Cal. 144, 151-2, 23 P. 139.).

Description of property. Generally.

Sec. 239. Section 1187 of the C.C.P. provides that the claim of lien shall contain, *inter alia*, "a description of the property to be charged with the lien, sufficient for identification."

A claim of lien which entirely omits to describe the real estate sought to be charged with the lien is fatally defective. (*Penrose v. Calkins*, 77 Cal. 396, 19 P. 641; *Fernandez v. Burleson*, 110 Cal. 164, 42 P. 566.)

This provision, like the other provisions of section 1187 with reference to the contents of the claim of lien, should be liberally construed. In *Willamette etc. Co. v. Kremer*, 94 Cal. 205, 209, 29 P. 633, it is said:

"The claimant is not required before filing his claim of lien, to make an accurate survey of the lot upon which the building stands, at the risk of losing his lien if he makes a slight mistake in giving its boundaries, nor is he even required to give the boundaries of the lot. Mr. Phillips, in his treatise on Mechanics' Liens, section 379, says: 'The best rule to be adopted is, that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is great reluctance to set aside a mechanic's claim merely for loose description, as the acts gen-

erally contemplate that the claimants should prepare their own papers, and it is not necessary that the description should be either full or precise." (See *Fernandez v. Burleson*, *supra*; *Brunner v. Marks*, 98 Cal. 374, 33 P. 265.)

The statute requires a description of the property to be charged with the lien. This would seem to require a description of the building, etc., where the lien is claimed against it. (*Lumber Co. v. Kremer*, *supra*.)

The question, however, is one of identification solely, and if the building is sufficiently identified by the description of the land upon which it has been constructed, a particular description of the building is not necessary.

Description of the property. What is sufficient description.

Sec. 240. The statute requires the property sought to be charged with the lien to be described, "sufficient for identification." The sole question in every case is, therefore, whether or not the property can be identified by the particular description given in the claim, and the cases afford the best illustration of the rule. (*Curnow v. Mining Co.*, 68 Cal. 262, 9 P. 149.)

In *Hotaling v. Cronise*, 2 Cal. 60, the notice filed described the property as the wharf situated on Battery street, between Pacific and Jackson streets, in San Francisco. The court in holding this description sufficiently certain to identify the property, say:

"We think the description of the property sufficiently certain. In *Springer v. Keyser*, 6 Wharton, a claim filed under the mechanics' lien law of Pennsylvania, describing the building as situated on the west side of Thirteenth, between Vine and James streets, was held sufficiently certain when in fact the building was on Thirteenth, between Callowhill and James streets; as the owner had no other house on Thirteenth street. In *Harkner v. Conrad*, 12 Serg. & R., it was held that a house

described as a three-story brick house, situated on the south side of Walnut, between Eleventh and Twelfth streets, was sufficiently certain."

In *Tibbetts v. Moore*, 23 Cal. 208, the property in the claim of lien was described as "Quartz mill in Amador county, known as Moore's new quartz mill." There was no evidence that there was any other quartz mill at that place so designated as to render it uncertain which was intended and the description was, therefore, held sufficient.

In this case the claim described the land around the mill in the language of the statute, to wit: "Such convenient space around the same (structure) or so much as may be required for the convenient use and occupation thereof." This was held sufficient.

A description by a common name is sufficient where the evidence shows that the property is well known and commonly spoken of by the name by which it is described. (*Tredinnick v. Mining Co.*, 72 Cal. 78, 13 P. 152.)

In *Willamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633, the claim of lien stated that the materials had been furnished and used in a building which the owner had caused to be constructed "upon lot 6, in block 28 of the Huber tract, said lot being situate at the southwest corner of Hope and Eighth streets." This description was held to be sufficient to identify the building although the lot and block named were on the northeast corner of the streets and part of the building was on lot 7, it not appearing that any other building had been erected by the owner at the intersection of such streets, than the one at the northeast corner. The description of the block identified the location of the lot and the call for the "southwest corner" of the streets could be rejected as a false call. (Overruling s. c. 24 P. 1026.)

The inclusion in the description of more land than is subject to the lien will not vitiate the claim. (*Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

What is not sufficient description of property.

Sec. 241. In *Montrose v. Connor*, 8 Cal. 344, the premises were described in the claim of lien as "a dwelling house lately erected by me for J. W. Connor, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot —."

In holding this description insufficient the court say :

"This is not such a description as is contemplated by the statute; there are a number of lots on Bryant street, between Second and Third streets, to any one of which it would apply as well as to the one in question. The fact that the owner owned no other dwelling on Bryant street, we think immaterial."

The statute under which this decision was made required in the claim a "correct description of the property." (Act. 1855, 157.) The premises had been sold to a *bona fide* purchaser. This distinguishes this case from *Hotaling v. Cronise*, 2 Cal. 60, cited *supra* sec. 240.)

The statute requires a description of some sort sufficient to identify the property and where the description by metes and bounds covers other property and there is nothing else in the claim to show the particular property sought to be charged with the lien, the claim is insufficient. The description of the property is one of the most important requirements of the statute. Without a sufficient description, the claim in most instances would be of no value to the owner and could rarely be of any use to creditors, purchasers, or other lien-claimants. (*Fernandez v. Burleson*, 110 Cal. 164, 42 P. 566.)

Description of property. Mining claims. Mortgages.

Sec. 242. Mining claims severally located on the same ledge and consolidated in one mining company, and worked by the company as one mine, may, for the purposes of the lien law, be regarded and treated as a single claim, and

declared on as such; and claims of lien may be filed upon the property as a whole without specifying the particular claim or location upon which the work was done. (*Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 P. 378.)

The mining claim is the property which must be described in the claim of lien even where the work and materials were furnished for a particular structure upon or in the mining claim. (*Williams v. Mining Co.*, 102 Cal. 140, 34 P. 702, 36 P. 388.)

A claim of lien upon a mine for work is not vitiated by the fact that it includes non-mineral land where it also includes mineral land which is subject to the lien, the court having the power to adjust the rights of the parties by its decree. (*Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

A mortgagee whose mortgage is subsequent to the lien of a mechanic's lien for labor, etc., upon the mortgage premises, cannot in a suit by him to set aside the decree, sale, etc., in the suit to foreclose the mechanic's lien, make the objection that the description of the property in the mechanic's lien is defective and therefore not sufficient to pass title under such sale. If the description is insufficient to pass title to the purchaser at the sale, the mortgagee has his remedy in ejectment. (*Gamble v. Voll*, 15 Cal. 507.)

One claim against two or more buildings. Amount due on each must be stated in claim.

The statute.

Sec. 243. Section 1188 of the C.C.P. reads as follows: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment,

mortgage, or otherwise, upon either of such buildings, or other improvements or upon the land upon which the same are situated."

The final clause of section 6 of the act of 1868 (stat. 1868, 591) provided for joint claims. Section 1188 was copied from section 6 referred to but upon its enactment in 1872 the clause with reference to joint claims was omitted.

One claim against two or more buildings. Comments on, and scope of statute.

Sec. 244. Giving to section 1188 the construction which the language used in it seems to indicate, its provisions apply to "every case" in which one claim is filed against two or more buildings, etc., erected by the same person. This section, however, must be interpreted in the light of the other sections of the lien law. The claim of lien is only a means for the perfection of a right to a lien which right is given by other provisions of the statute. The claim, in itself, does not, and cannot, primarily determine the amount for which the lien can be enforced. It does not make, and it cannot modify, or change, the terms of the contract which, in every instance, is the foundation of the lien. There is nothing in the lien law which requires a contract for the construction of several different buildings by the same contractor and for the same owner, to designate the price to be paid for the construction of each of those buildings, nor, is there anything in the lien law which requires the contract of the laborer who performs labor upon, or the materialman who furnishes materials for, the several buildings owned by the same owner, to fix the price or amount to be paid for either.

One claim against two or more buildings. Objections to construction which makes section 1188 apply to all cases.

Sec. 245. Serious objections arise to the construction of this section which makes it apply to "every case in which one claim is filed against two or more buildings, mining claims or other improvements owned by the same person." Where under one contract for a fixed price, several buildings are to be constructed by the same contractor, it is practically impossible to designate the amount due on each building.

It is true that the contractor in such case could, perhaps, by keeping an account, determine the quantity and value of the materials furnished for, and the amount and value of the labor performed upon, each of the buildings, and with this information apportion the contract price between the several buildings and state the answers of his arithmetical problem in his claim; and it is also true that the laborer employed by the contractor could keep a time-book and arrive at a similar result; but if this is the statutory method of determining the amount "due" on each building, the materialman, since he can enforce his lien for his materials only which have been *used* in the particular building, would be required, not only to keep an account of the quantity of lumber delivered for each building, but also to tag each shingle so that upon completion of the building, with these expedients at hand, he could make up his accounts and thus meet the exacting requirements of the statute.

One claim against two or more buildings. To what cases section 1188 applies.

Sec. 246. It is evident, however, that it was not the intention of the legislature that section 1188 should apply to "every case in which one claim is filed against two or more buildings, mining claims or other improvements," and upon careful attention to the language of this section, it will be found that this intention is so expressed.

The statute requires the lien-claimant to state the amount "due" to him on each of the buildings. The meaning of the word "due" as used in section 1188 must be ascertained from the lien law as a whole. As thus viewed, "due" is used with reference to the amount to be paid to the lien-claimant. The amount to be paid to the lien-claimant is that fixed by the terms of an express contract, or that implied by law. In either case the amount to be paid becomes due by virtue of a contract or of the law. The word "due" means, therefore, the amount contracted to be paid by the owner to the contractor or to the subcontractor, laborer or materialman, or the amount fixed by law, and consequently, this is the amount which the statute requires to be designated in the claim of lien. (*Hicks v. Murray*, 43 Cal. 523 *Crockett J.*; *Lumber Co. v. Knapp*, 122 Cal. 79, 54 P. 533.)

In *Warren v. Hopkins*, 110 Cal. 506, 510, 42 P. 986, it is said:

"While section 1188 requires the claimant who files a lien against two or more buildings, or other improvements, to designate the specific amount for which he claims a lien upon each of such 'improvements,' it does not require him to make such designation unless there is in fact a specific amount due to him on each of such improvements, and it might frequently happen that a contractor would construct several buildings under one contract, and there would not be any specific amount due to him on each of such buildings. In the present case the plaintiffs made a single contract for the grading of the two blocks at a fixed price, and, as it appears that the character of the two blocks was such that the earth taken from one was to be used in filling up the other and that the compensation for the entire work was fixed at 'ten cents per cubic yard for filling,' it is evident that there could be no separate amount chargeable against either block" * * *

It is believed, therefore, that the scope of section 1188 is limited to those cases where, by the terms of the contract which provides for the construction of several different buildings, or other improvements, the price of each building or other improvements, is agreed upon or otherwise fixed.

**One claim against two or more buildings.
Statute applies to claims of laborers,
materialmen and all other claimants.**

Sec. 247. This rule applies to the subcontractor, the laborer and the materialman as well as to the original contractor. If the materialman, for instance, furnishes materials to the original contractor for the construction of several different buildings which are being constructed by the latter for the same owner, the statute does not require him to designate the amount due him for materials furnished and used in each building. If, however, the materialman, in the case stated, has furnished materials for the construction of one of the buildings under a separate contract therefor, or has furnished materials for the construction of all of them under separate contracts for each building, then his contract falls within the provisions of section 1188, and he is required to designate in his claim of lien the amount due him on each building, and if he fails to do this, his lien is postponed to other liens.

One claim against two or more buildings. Section 1188 applies to joint claims only.

Sec. 248. Under the rule of construction laid down, section 1188 requires the designation in the claim of lien of the amount due the claimant on each building, in those cases only where there is a separate contract for the construction of each building, or separate contracts with the laborer for his work upon, or with the materialman for his materials furnished for, each building.

In the discussion thus far the illustrations used, have been confined to contracts between the same contractor and the same owner. But this section was never intended to be limited to cases where buildings were constructed by one contractor, under one entire contract, and for the same owner, and herein, it is believed, the real intention of the legislature appears.

The language of section 1188 is that "in every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person," the claimant must designate in the claim the amount due him on each building, etc.

The owner may contract with several different contractors for the construction by each of them of a building, or he may make separate contracts with the same contractor for the construction of several buildings. The rule is the same in both cases, and the lien claimant who performs labor upon, or furnishes materials for, two or more of the buildings, may file a separate claim against each of the buildings for the amount of his demand against it, or he may file a joint claim against all of the buildings for his joint demand but in the latter case he must make the proper averments to establish a claim against each building and designate in his joint claim the amount due him on each of the buildings, or his lien will be postponed to other liens.

This is the rule laid down in *Booth v. Pendola*, 88 Cal. 36, 25 P. 1101; s. c. 23 P. 200, 24 P. 714. In this case there were two houses built on the same lot, at different times and under different contracts, but by the same contractor and for the same owner. It was objected that some of the claims did not state the amount due the claimant on each house and it was held that such being the case, the only effect was to postpone the liens of such claims to other liens.

It will be observed that this section is permissive merely. It does not require a joint claim in any case. If, however, a joint claim is filed against two or more buildings, then the claimant must designate in his joint or double claim the amount due him on each building.

One claim against two or more buildings. Objections to the rule of construction laid down. Mining claims.

Sec. 249. It may be argued that the true construction of section 1188 is that which makes its provisions applicable to those cases only where one claim of lien is filed against several buildings or other improvements owned by the same person and constructed upon the same piece of land.

There is a dictum to this effect in *Dickenson v. Bolyer*, 55 Cal. 285. In this case a dwelling house had been constructed upon a mining claim and work had been performed upon a tunnel therein and upon other portions thereof. One claim of lien was filed and the court, in holding that it was not necessary to designate in the claim the amount due on each improvement in order to preserve the priority of the lien over that of a mortgage lien, used this language:

“We think appellants (mortgagees) do not correctly construe this section. It plainly applies only to cases in which one claim of lien is filed against two or more separate and distinct ‘buildings, mining claims or other improvements, owned by the same person,’ and not to a case where, as here, all of the work was performed upon one and the same piece of property, although upon different portions of it.” (See also *Lothian v. Wood*, 55 Cal. 159, 163.)

The correctness of this decision, upon the facts before the court, is not doubted, but the reasoning of the court, by which it was arrived at, is faulty. The property against which the claim of lien was filed in this case was a mining claim. The lien law makes the *whole* mining claim subject to liens for work done upon, or for materials furnished for, the improvement of a mining claim or for the construction of any buildings upon it. (*Williams v. Mountaineer etc. Co.*, 102 Cal. 134, 34 P. 702, 36 P. 388; *Helm v. Chapman*, 66 Cal. 291, 5 P. 352; *Silvester v. Coe Quartz M. Co.*, 80 Cal. 510, 22 P. 217; *Tibbetts v. Moore*, 23 Cal. 208, 213.)

And the same rule applies to cases where two or more mining claims, owned by the same person, have been consolidated and worked as one mine. In such case the lien-claimant need not designate the amount due upon each claim, but he may file one claim against the consolidated mining claims. (*Tredinnick v. Mining Co.*, 72 Cal. 78, 13 P. 152; *Malone v. Big Flat etc. Co.*, 76 Cal. 578, 18 P. 772; *Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 P. 378.)

What was said by the court, therefore, with reference to the construction of two or more separate and distinct buildings upon the same piece of property was unnecessary to the decision. According to the rule laid down by this decision, if the owner should contract with the same contractor for the construction of several separate and distinct buildings upon as many different pieces of property, at an aggregate price for all of them, the claimant would be required to designate in his claim of lien the amount due him on each building which, as we have shown, cannot be done. Under the contract as stated there can never be anything "due" to any person on any one of the several buildings. (*Warren v. Hopkins*, 110 Cal. 506, 510, 42 P. 986.)

One claim against two or more buildings. Objections to the rule of construction laid down.

Sec. 250. It may be urged against the rule of construction laid down that the result of it will work great injustice to persons who have acquired liens by mortgage, judgment or otherwise upon some one of the several parcels of land against which several parcels one claim of lien has been filed and upon which it is a prior lien. And to show this injustice, it may be argued that where the owner of several separate and distinct parcels or lots of land, for instance, by one contract with the original contractor, at an aggregate price, causes a building to be erected upon each of the lots, a subsequent mortgagee of one of the lots would be afforded no opportunity to protect his interest in the lot under his mortgage lien, because under the rule of construc-

tion laid down, the liens of the original contractor, subcontractor, laborer and materialman, would be against the several lots and the buildings thereon as a whole.

The answer to this argument is threefold:

1. In an action of the lien-claimant to foreclose his lien, in which action the subsequent mortgagee is of course made a party, it becomes the duty of the latter to set forth his lien and its rank, the various liens upon all of the several parcels of land, and to invoke the equity powers of the court to decree a sale of the parcels in such order as will protect his interest (so far as any subsequent lienor can be protected) under his mortgage. (See secs. 2899, 3433, Civil Code.)

2. The suit of foreclosure having gone to judgment, it becomes the duty of the officer selling the property thereunder, if the property consists of several known lots or parcels, to sell them, or rather to offer them for sale separately, and "when a portion of such real property is claimed by a third person and he requires it to be sold separately, such portion must be thus sold." (Sec. 694, C.C.P.)

3. The subsequent mortgagee having taken his mortgage with notice of the condition of the property and of the lien, is in no position to say that he has been wronged thereby.

One claim against two or more buildings. Effect of failure to designate amount due on each building. Lien limited to amount stated.

Sec. 251. The penalty imposed by section 1188 for the failure to designate in the claim of lien the amount due on each building, mining claim or other improvement, where such designation is required, is that the lien of such claimant is postponed to other liens. (*Booth v. Pendola*, 38 Cal. 36, 25 P. 1101, s. c. 23 P. 200, 24 P. 714.) If there are no other liens, it follows, of course, that the lien arising from the filing of such a claim is unaffected in any manner.

(*Tibbetts v. Moore*, 23 Cal. 208, 215.) "Other lienors" are the only persons who can call in question the sufficiency of a claim to meet the requirements of this section. It is of no concern to the owner whether or not the claim designates the amount due on each building. (*Dickenson v. Bolyer*, 55 Cal. 285; *Booth v. Pendola*, *supra*.)

Again, where the claim designates the amount due on each building, the claimant is limited to the amount stated as against "other creditors having liens by judgment, mortgage or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated." (Sec. 1188 C.C.P., *supra*.)

Contents of claim. Generally. Miscellaneous decisions.

Sec. 252. The statute (sec. 1187 C.C.P.) would seem to require an express charge in the claim of lien upon the property. It says that "all persons claiming the benefit of this chapter" must file their claims of lien, etc. A statement, however, that the claimant "claimed the benefit of the provisions of the Code of Civil Procedure relating to liens of mechanics on real property" is sufficient for this purpose. (*Russ etc. Co. v. Garrettson*, 87 Cal. 590, 25 P. 747; *Brigham v. Knox*, 59 P. 198.)

The claim of lien need state those facts only which are required to be stated by section 1187 of the C.C.P. (*Corbett v. Chambers*, 109 Cal. 178, 41 P. 873.)

A mechanic's claim of lien is not a "claim" against an estate within the meaning of subdivision 3 of section 1880 of the Code of Civil Procedure. (*Booth v. Pendola*, 88 Cal. 36, 25 P. 1101; *Holbrook v. Hasson*, Superior Court L. A. Co., 1896, Judge Noyes presiding.)

If more than one notice is given claiming a lien for the same demand, the several notices cannot be considered together for the purpose of determining the sufficiency of notice to hold a lien, but each must stand on its own merits

and the lien will not exist unless one of the notices is sufficient in itself to give it. (*Davis v. Livingston*, 29 Cal. 283.)

Where there is a substitution of a new contractor who has simply stepped into the shoes of the original contractor and has assumed all liabilities, with the knowledge and consent of the owner of the structure, and who is the only person with whom the owner has to settle, it is not necessary for a materialman claiming a lien to segregate the materials furnished to each contractor in his claim of lien, and if the proof segregates the amount furnished to each of them, no injury can possibly result to the owner. (*Harmon v. S. F. etc. R. R.*, 86 Cal. 617, 25 P. 124. See former opinions in s. c. 23 P. 1024, 22 P. 407.)

Contents of claim. Matters which need not be stated in claim of lien.

Sec. 253. The steps which are requisite to the enforcement of a lien are entirely of statutory creation and the same rule which makes it essential that all the statutory requirements shall be complied with, in order to perfect the lien, renders it unnecessary to take any other step than is thus required. The statute requires that certain statements shall be made in the claim of lien, and it follows that no statements other than those required by the statute need be made. (*Corbett v. Chambers*, 109 Cal. 178, 41 P. 873.)

Therefore, the claim need not state that the building has been completed. (*Harmon v. Ashmead*, 68 Cal. 321, 9 P. 183; *Slight v. Patton*, 96 Cal. 384, 31 P. 248.)

Nor the name of the owner at the time claimant was employed or furnished materials; nor that his employer, or the person to whom the materials were furnished, had any contractual relations with the owner, or with the person named in the notice as the owner. (*Corbett v. Chambers*, *supra*.)

Nor that the claim of lien was filed within thirty days after the completion of the work. (*Slight v. Patton, supra.*)

Nor that the owner of the soil had personal or actual knowledge that the work was being done. (*Jewell v. McKay, 82 Cal. 144, 146, 23 P. 139.*)

Nor the nature of the alterations made or whether each person performed a separate alteration. (*Jewell v. McKay, supra.*)

Nor the value of the materials furnished. (*Jewell v. McKay, supra.*)

Nor state facts showing the performance of the contract. (*Jewell v. McKay, supra.*)

Nor state anything subsequent to or outside of the contract. (*Jewell v. McKay, supra.*)

Nor the relation the person to whom the claimant furnished materials bore to the owner, whether contractor or agent. (*Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 22 P. 860.*)

Contents of claim. Matters which need not be stated in claim, continued.

Sec. 254. It is not necessary to state in the claim of lien that the person to whom the claimant furnished materials had authority to bind the owner whereby the claimant became entitled to a lien. These facts are matters of pleading and proof at the trial. (*Davies Henderson L. Co. v. Gottschalk, 81 Cal. 641, 22 P. 860.*)

Nor is it necessary to state in the claim the particular character of the materials furnished, or that the materials were used in the building against which the lien is claimed. (*Davis v. Livingston, 29 Cal. 283; Hicks v. Murray, 43 Cal. 523.*)

Nor that the materials were furnished "to be used" in the building. (*Neihaus v. Morgan, 45 P. 255.*)

Nor, where there is a substitution of a new contractor is it necessary to segregate the materials furnished to each

contractor. (*Harmon v. S. F. R. R.*, 86 Cal. 617, 25 P. 124, see s. c. 22 P. 407, 23 P. 1024.)

Nor to state the date of the contract, or the time when the transactions were had between the lien-claimant and the owner or his agent. (*California Powder Works Co. v. Blue Tent etc. Co.*, 22 P. 391; *Pacific etc. Co. v. Fisher*, 109 Cal. 566, 568, 42 P. 154.)

Nor, where materials have been furnished and labor performed under one contract for a gross sum, is it necessary to specify in the claim, how much of the sum due accrued for materials furnished and how much for labor performed. The contract being that both were to be paid for by a gross sum, it is unnecessary to apportion the amount between the materials and the labor. (*Hicks v. Murray*, 43 Cal. 515, 552, opinion of Crockett, J.)

Nor is it necessary to set out items of the account. (*Brennan v. Swasey*, 16 Cal. 141; *Selden v. Meeks*, 17 Cal. 129; *Davis v. Livingston*, *supra*; *Jewell v. McKay*, 82 Cal. 150, 23 P. 139.)

Nor of items of the work and materials where the contract is for a sum in gross. (*Heston v. Martin*, 11 Cal. 42; *Hicks v. Murray*, 43 Cal. 523, *supra*.)

Claim of lien cannot be amended or reformed.

Sec. 255. A claim of lien is not an instrument in the nature of a written contract which can be reformed by a court of equity in appropriate cases. It is rather a prerequisite to the maintenance of a proceeding which gives the plaintiff an extraordinary remedy, to secure the benefit of which he must comply with the terms on which the statute extends to him the statutory relief. (*Goss v. Strelitz*, 54 Cal. 640, 644; *Madera Flume etc. Co. v. Kendall*, 120 Cal. 182, 52 P. 304; *Fernandez v. Burleson*, 110 Cal. 164, 42 P. 566.)

Nor can a claim of lien be amended. It must be complete in itself at the time it is filed for record in order to

authorize the enforcement of a lien. (Madera Flume etc. Co. v. Kendall, *supra*; Fernandez v. Burleson, *supra*.)

In Fernandez v. Burleson, *supra*, the property was described in the claim both by a common name and by a particular description which was defective and it was sought to amend the claim by expunging the particular description, but the court say:

“If this were a case of mistake as to some incident of the description, the mistaken circumstance, like a false call in a deed, would be rejected. (Willamette etc. Co. v. Kremer, 94 Cal. 209, 29 P. 633, s. c. 24 P. 1026;) but, on the contrary, the error is of the essence of the description. To reject the particular description and rely on the adventitious circumstances which accompany it would be to invert the maxim that the incident follows the principal and not the principal the incident”

* * *

Verification of claim. The statute.

Sec. 256. Section 1187 of the C.C.P. *inter alia* provided that the claim of lien of the claimant “must be verified by the oath of himself or of some other person”

* * *

The statute it will be observed, does not require the claim to be *signed* by the claimant. The claim, however, must be verified and this takes the place of the signature to the claim. (Hicks v. Murray, 43 Cal. 515.) The verification is an essential part of the lien, that is, it is one of the formalities which must be observed and without which the claim will be invalid.

The claim for work or materials furnished for a public building or other work constructed or done under contract with a public corporation must under the act of 1897 (stat. 1897, 201) be verified. (See this act sec. 22, *supra*.)

There is also a similar provision in the street improvement act of 1885, as amended in 1899 (stat. 1899, 23,) which provides for labor performed upon or material furnished for street or sewer work of municipalities. (See this act sec. 22a, *supra*.)

What is sufficient verification. Time of verification.

Sec. 257. The statute does not prescribe the form of the affidavit, nor declare what it shall contain. The affidavit, therefore, need not be in any particular form, nor in the form of the verification usually attached to pleadings. It is doubtful if the latter verification would be sufficient, since it may be made upon "information or belief." The statute requires positive statements in the claim of lien, and the affidavit must be equally positive of the truthfulness of those statements.

The statute not having prescribed any particular form of the verification, one which states only that the claim "is true" is sufficient; and the omission to the state "of his own knowledge" is not a defect. (*Arata v. Tellurium etc. Co.* 65 Cal. 340, 4 P. 195.)

A claim of lien was subscribed "Williams & Whitmore," and immediately following, the signature was a verification which commenced thus:

" ————— being duly sworn, deposes and says that he is one of the persons named as Williams and Whitmore in the foregoing claim of lien," etc., and was subscribed by A. C. Williams and duly attested, and it was held that the verification showed who was sworn, and was sufficient. (*San Diego L. Co. v. Wooldredge*, 90 Cal. 574, 27 P. 431.)

The verification need not state the particulars which the law requires to be contained in the claim of lien; the verification is only required to state that the claim is true. (*Reed v. Norton*, 90 Cal. 590, 27 P. 426; s. c. 26 P. 767.)

Nor is it fatal to the claim of lien that the verification recites that the "facts therein stated are true;" instead of stating that the "claim is true;" nor because it states that a named person was the owner of the "premises" instead of the owner of the "building." (*Corbett v. Chambers*, 109 Cal. 178, 41 P. 873.)

A claim of lien is usually prepared, signed and verified after the performance of claimant's contract and after the completion of the building or other structure or improvement. A claim, however, verified after the work is done and the materials are furnished, is not premature though made several months prior to the completion of the building and to the filing of the claim of lien for record. (*Coss v. MacDonough*, 111 Cal. 662, 44 P. 325.)

**Claim must be filed for record. Place of filing.
The statute.**

Sec. 258. Section 1187 of the C.C.P. provides, *inter alia*, that the lien-claimant claiming the benefit of the lien law, within the time therein stated,

"must file for record with the county recorder of the county, or city and county, in which such property [sought to be charged with the lien] or some part thereof is situated, a claim containing a statement of his demand," etc.

Where the property lies in two different counties, the filing of a claim of lien against it in one county is sufficient. (*Brigham v. Knox*, 59 P. 198.)

Section 1189 of the same code also provides:

"The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments." (See also as to manner and book for recording claims of lien, sec. 4236, sub. 16, Political Code; also sub. 6, sec. 120, County Government act of 1897, stat. 1897, 484. For fees of recorder see fee act of 1895, stat. 1895, 267.)

The claims under the act of 1897 (stat. 1897, 201) with reference to work upon the property of public corporations, must be filed with the board, trustees, officers, etc., by which the contract for the work was awarded. (See this act sec. 22, *supra*.)

There is a similar provision in the street improvement act. (See sec. 22a, *supra*.)

Unless claim of lien is filed it cannot be enforced.

Sec. 259. The statute leaves it optional with persons entitled to liens whether or not to claim them. It gives the right to a lien but in order to perfect and enforce this right, it requires certain procedure on the part of the lien-claimant. He may, therefore, be entitled to a lien, and still not have the right, under the statute, to enforce it. The performance of the work, or the furnishing of the materials, in itself, does not give the right to enforce a lien for either. Section 1187 of the C.C.P. expressly says that persons "claiming the benefit of this chapter" concerning liens "must" file their claims as therein provided.

Unless, therefore, the claim of lien is filed, the lien cannot be enforced. (*Willamette etc. Co. v. College Co.*, 94 Cal. 230, 29 P. 629; *Walker v. Hauss-Hijo*, 1 Cal. 183; *Marchant v. Hayes*, 120 Cal. 137, 52 P. 154; *Mars v. McKay*, 14 Cal. 127; *Pacific etc. Co. v. Fisher*, 106 Cal. 224; 39 P. 758; *Weithoff v. Murray*, 76 Cal. 508, 18 P. 435; *Morris v. Wilson*, 97 Cal. 644, 32 P. 801; *McCrea v. Craig*, 23 Cal. 522; *Joost v. Sullivan*, 111 Cal. 286, 43 P. 896.)

And this rule applies to contracts void for want of record as well as to all others. (*Southern Cal. etc. Co. v. Schmidt*, 74 Cal. 625, 16 P. 516.)

And the fact that the owner consents to judgment foreclosing the lien, when the claim has not been filed for record in time, will not defeat the right of a prior mortgagee to claim priority over the lien of the claimant. (*Horn v. Jones*, 28 Cal. 195, 203.)

Where the claimant files for record several claims for the same work or materials, each claim must stand on its own merits and no lien will exist unless one of the claims is sufficient in itself to give it. (*Davis v. Livingston*, 29 Cal. 283.)

A claimant is not required to file for record notice of his claim as in case of claiming a lien against a building or structure, in order to avail himself of the remedy provided for by section 1184 of the C.C.P. for intercepting the contract price in the hands of the owner by notice. (*First Nat. Bank v. Perris etc.* Dist. 107 Cal. 55, 40 P. 45.)

It is not necessary that the claim of lien should remain in the recorder's office after it has been recorded. (*Mars v. McKay, supra.*)

Time within which claim must be filed. The statute.

Sec. 260. Section 1187 of the C.C.P., *inter alia*, provides "Every original contractor [a, 97], at any time after the completion of his contract, and until the expiration of sixty days after the filing of said notice of completion or notice of cessation of labor by the owner and every person, save the original contractor, claiming the benefit of this chapter, at any time after the completion of any building, improvement, or structure, or of the alteration, [87] addition to [87], or repair thereof, and until the expiration of thirty days after the filing of said notice of completion or cessation, by said owner, or within thirty days after the performance of any labor in any mining claim, must [97] file [73-4] for record [73-4] with the county recorder of the county, or city and county, in which such property or some part thereof is situated, a claim containing a statement of his demand, * * *

[97] "Provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, [87] addition to [87], or repair thereof." [97.]

For the notice of completion or of cessation by the owner here referred to, see sec. 273, *et seq., infra*. For section 1187 in full, amendments thereto, notes thereon and explanation of figures and brackets, see section 5, *supra*.

The same. History of legislation.

Sec. 261. A provision, similar to the one just quoted in the preceding section of this chapter, has been incorporated in every lien act of this state. Section 7 of the lien act of 1850 (stat. 1850, 211, 1850-3, 808) provided that "any person wishing to avail himself" of that act, whether his claim was due or not, should file a claim of lien in the recorder's office "at any time before the expiration of sixty days after the completion of the building or repairs."

It will be observed that this act did not provide different times within which different classes of claimants should file their claims. The lien act of 1855, section 3, (stat. 1855, 157) amended the last act in this particular and as amended required every person, except a subcontractor, journeyman, or laborer, to file his claim of lien within sixty days "after the labor is completed or the materials furnished," and the subcontractor, journeyman or laborer to file his claim of lien within thirty days "after the work was done, or the materials were furnished by him."

The lien act of 1856, section 2, (stat. 1856, 202), left the time within which liens could be filed the same as in the act of 1855, but as to all persons except a subcontractor, journeyman or other person performing labor or furnishing materials, provided that the claim should be filed within sixty days "after the completion of such building," etc., and as to the latter, "within thirty days after the work was done or the materials were furnished by him."

The lien act of 1862 (stat. 1862, 390) slightly amended the last mentioned act with reference to the matter under consideration, and provided (sec. 25) that "every subcontractor, or other person other than the original contractor, who shall acquire any lien under the provisions of this act, shall, within thirty days after the completion or repair of any such building," etc., file for record his claim of lien. "The original contractor having a lien, shall file such verified account [claim] * * * within sixty days after the completion or repair of such building," etc.

The lien act of 1868 (stat. 1868, 590); section 1187 of the Code of Civil Procedure as adopted in 1872, as amended in 1873-4 (amndts. 1873-4, 107) and as again amended in 1887 (stat. 1887, 154), are, so far as the time within which claims may be filed, substantially in the same language.

Section 1187 as amended in 1887 provided: "Every original contractor within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration, addition to, or repair thereof, or the performance of any labor in a mining claim, file for record * * * a claim containing a statement of his demand." * * *

Section 1187 was not amended again until 1897 (stat. 1897, 202) and as amended in that year, so far as relates to the time within which claims of lien must be filed, has been quoted in the next preceding section.

Events from which time to file claim begins to run. Comments on statute.

Sec. 262. The statute under consideration, for the purpose of fixing the time within which claims of lien must be filed for record, has created two classes of lien-claimants, viz:

1. Original contractors; and
2. Every person save the original contractor.

For the first class the statute has prescribed a limitation of sixty days and for the latter thirty days.

Again, recognizing the same classification, the statute has fixed upon two different events from which these limitations of time respectively begin to run. It provides that:

1. "Every original contractor at any time *after the completion of his contract*, and until the expiration of sixty days after the filing of said notice of completion or notice of cessation of labor by the owner; and

2. "Every person, save the original contractor, claiming the benefit of this chapter, at any time *after the completion of any building, improvement, or structure, or of the alteration, addition to, or repair thereof*, and until the expiration of thirty days after the filing of said notice of completion or cessation, by said owner; or

"Within thirty days after the performance of any labor in any mining claim,

"Must file for record * * * a claim," etc.

Events from which time to file claim begins to run. Comments on statute continued. Division of subject.

Sec. 263. Section 1187 also lays down a rule of evidence by which to determine, in most cases, when the work mentioned in the statute is deemed completed. It provides generally that a trivial imperfection in the work shall not be deemed such a lack of completion as to prevent the filing of any lien, and that the occupation, use or acceptance of a building by the owner, or his agent or representative, and cessation from labor for thirty days upon any contract, or upon any building, etc., shall be deemed equivalent to the completion thereof for all the purposes of the lien law. (See sec. 283, *infra*, for statute.)

The same section, for the purpose of removing still further the uncertainties surrounding the question of the completion of the contract, or of the building, or other improvement, and of affording a further protection to lien-claimants, has made it the duty of the owner to file for record a notice, containing among other things, the date of the completion of the work upon the building, or the cessation from labor thereon. (See sec. 273, *infra*, for statute.)

At first glance the provisions of section 1187, requiring owners to file for record notice of completion of the work, or of cessation from labor, might appear to have settled the troublesome question of the completion of the contract, or of

the work, and that lien-claimants might henceforth be assured that they had a certain and fixed time in every case, within sixty or thirty days after which, to file their claims of lien. As applied to every case this is not the fact. The same section provides "that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to or repair thereof." (See sec. 282, *infra*, for statute.) So that if the owner does not file for record a notice of completion or of cessation, the lien-claimant must still determine as a fact, though by the rules given by this section, the date of the completion or of cessation from labor, and must determine it rightly under penalty of losing his lien if his claim is not filed in time.

It will thus be seen that the time within which claims of lien must be filed for record depends upon the determination of the status of the lien-claimant and upon the time of the completion of the contract or of the work. The presentation of these matters follows.

Time within which to file claim. Original contractors.

Sec. 264. The statute has named one of the classes of persons to whom it gives the right to a lien for his work and materials, "original contractors."

In another chapter of this work we have attempted to ascertain from the statute and the decisions of the court construing it, who is an original contractor. (See chap. III, sec. 44, *et seq.*) It is, therefore, unnecessary in this place to repeat what has there been said.

The status having been determined, nothing remains of the subject under consideration (the time within which original contractors must file their claims of lien for record) than the determination of the question of the completion of the contract of the original contractor, either actually or in contemplation of the lien law, within sixty days after which

event his claim of lien must be filed, if notice by the owner be filed for record, and in any event within ninety days after completion of the building, etc.

In subsequent sections of this chapter the subject of completion of the contract will be considered under the sub-heads of "Trivial Imperfection," "Occupation, Use and Acceptance;" "Cessation from Labor," and "Notice of Completion by Owner."

The same. The decisions.

Sec. 264a. When a building is constructed by the owner under distinct contracts for the different departments of work, each person contracted with is an original contractor and can file his claim of lien within sixty days after the completion of *his* contract irrespective of the time when the building is completed. (*Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758; *Powder Co. v. Flume Co.*, 88 Cal. 20, 25 P. 976; *Pacific etc. Co. v. Bear Valley etc. Co.*, 120 Cal. 94, 52 P. 136.)

Where the contract is entire but one claim of lien can be acquired by the original contractor and he cannot, because successive payments fall due from time to time, file a lien for each payment. (*Cox v. Railroad*, 47 Cal. 87.)

An original contractor may file his claim of lien before the expiration of thirty-five days after the completion of his contract notwithstanding his contract provides that the last payment of twenty-five per cent. of the price should become due thirty-five days after the completion and acceptance of the building, "provided said building and premises were free and clear from all liens and incumbrances arising from or created or placed thereon by said contractors." (*Knowles v. Baldwin*, 125 Cal. 224, 57 P. 988.)

Time within which to file claim. Materialmen, laborers and subcontractors.

Sec. 265. As we have already pointed out, the statute, for the purpose of fixing the time within which claims of lien must be filed for record, has created two classes of lien-claimants—original contractors and every person save original contractors—and has prescribed different times within which their respective claims must be filed—sixty days for the former and thirty days for the latter.

Materialmen, subcontractors and laborers, must file their claims within thirty days whether the work and materials were furnished under a void or a valid contract between the contractor and the owner. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 234, 29 P. 629; *Sparks v. Mining Co.*, 55 Cal. 389.)

In another chapter the questions of who is a materialman, who is a laborer and who is a subcontractor, have been presented. (See chap. III, secs. 54, 62, 63, *supra*.)

The status of a lien-claimant having been ascertained as that of a laborer, materialman or a subcontractor, he falls into the class of persons other than original contractors, and must, therefore, file his claim of lien under the statute (sec. 1187) "at any time after the completion of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, and until the expiration of thirty days after the filing of said notice of completion or cessation, by said owner, or within thirty days after the performance of any labor in any mining claim * * * provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof."

The two material points in determining the time within which persons other than original contractors, must file their claims of lien, are the status of such lien-claimant and the completion of the building, etc. The first of these points, as above stated, has already been considered and the latter will be considered in the subsequent sections of this chapter.

The same. The decisions.

Sec. 265a. A materialman cannot file his claim of lien until after the completion of the building. (Pacific etc. Co. v. Fisher, 106 Cal. 224, 226, 39 P. 758; Roylance v. Hotel Co., 74 Cal. 273, 277, 15 P. 777, 20 P. 573; Pacific etc. Co. v. Bear Valley etc. Co., 120 Cal. 94, 52 P. 136.)

As to time for filing claims where there are distinct and separate contracts for different departments of the whole work, see Pacific etc. Co. v. Fisher, *supra*; Powder Co. v. Flume Co., 88 Cal. 20, 25 P. 976.

Where materialmen furnish materials directly to the owner their claims of lien therefor are prematurely filed if filed before the completion of the work. (Schwartz v. Knight, 74 Cal. 432, 16 P. 235; Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648; Malone v. Big Flat etc. Co., 76 Cal. 585, 18 P. 772.)

Where the contract for making several items of repairs is entire, the claim of lien of a materialman filed within thirty days after the completion of the whole work is in time. (Silvester v. Mining Co., 80 Cal. 510, 22 P. 217; Cox v. Railroad, 44 Cal. 18.)

Where the material was furnished before the recording of the original contract, the materialman is entitled to a lien therefor if he files his claim within thirty days after the acceptance of the structure. (Powder Co. v. Flume Co., 97 Cal. 263, 32 P. 172.)

For time within which to file claim of lien upon cessation of labor, etc., see section 293; use and occupation, section 289; and acceptance, section 292, *infra*.

For effect of termination of employment by death of employer, see Weithoff v. Murray, 76 Cal. 508, 18 P. 435.

See also abandonment, section 270; mining claims, section 266; premature filing of claim, section 271; filing from time to time as work progresses, section 272; when must be filed within ninety days after completion of the building, etc., sections 281, 282; one claim against two or more buildings, section 243 *et seq.*

For time of filing claims for labor and materials furnished for work upon property of public corporations and for streets and sewers, see sections 22 and 22a, *supra*.

Time within which to file claim. Labor in and materials for mining claims.

Sec. 266. Section 1187 of the C.C.P. provides that a claim of lien against a mining claim must be filed "within thirty days after the performance of any labor in any mining claim." The necessity for such a provision is apparent. There are certain classes of labor performed "in a mining claim" and upon improvements therein or thereon which may never be "completed." Labor performed, for instance in the working of a developed mine or in the developing of a mine, may continue indefinitely, and a limitation that the claim of lien of a laborer who has performed labor upon such mine must be filed within thirty days after the completion of the mine or improvement, fixes an event which may not happen in the lifetime of the lien-claimant. The statute has, therefore, guarded against this contingency by providing that, in the case stated, the lien-claimant must file his claim within thirty days after the performance of any labor in any mining claim. The event, therefore, within thirty days after which such claims of lien must be filed, is the performance of any labor in any mining claim, that is, the completion of the laborer's contract for the performance of labor. (See *Williams v. Mining Co.*, 102 Cal. 134, 139, 34 P. 702, 36 P. 388.)

But where the laborer works by the month, the employment does not terminate at the end of each month, and separate claims of lien for each month are not, therefore, required to be filed within thirty days from the end of each month. (*Malone v. Mining Co.* 76 Cal. 57, 18 P. 772.)

The same.

Sec. 267. Section 1187, however, is silent concerning the time within which claims of materialmen for materials furnished for an improvement upon or in a mining claim must be filed for record. This silence seems to confirm the

fact stated in the note to section 124, *supra*, that the statute (sec. 1187) does not give a lien for materials furnished for the improvement of a mining claim. There are several cases where such claims have been passed and the liens thereunder enforced but the point here mentioned was not presented. *California Powder Works v. Blue Tent etc. Co.*, 22 P. 391 is one of the cases. In this case the plaintiff furnished powder to the defendant (owner) which was used by the latter in the construction of ditches, canals and other improvements upon a mining claim which improvements had not been completed at the time plaintiff filed his claim of lien, and were of such nature that work upon them and material for them would be continued to be done and furnished indefinitely, and it was held that section 1187 requiring claims of lien to be filed within thirty days after the completion of the improvement, etc., did not refer to the operation of a mine which may be continuous in its nature, as the thing to be completed, and the rule was laid down that the statute not having fixed the time when such a claim must be filed for record, a reasonable time was allowed for that purpose, and sustained the claim in question which was filed more than thirty days after cessation of work and more than three months after the last materials were furnished.

Completion generally. Erection in part. Certificate of architect.

Sec. 268. A building which is erected in part only should be held to be completed, within the meaning of section 1187 of the C.C.P. when it appears that it was the original intention of the owner so to erect it in part only, or when, having proceeded to erect it in part, he abandons his design of finishing it. (*Schwartz v. Knight*, 74 Cal. 432, 16 P. 235; *Marchant v. Hayes*, 120 Cal. 137, 52 P. 154.)

In the absence of anything to the contrary in the contract, the completion of the contract means the completion

of the whole work called for by the contract. (*Clark v. Collier*, 100 Cal. 256, 34 P. 677.)

The certificate of the architect provided for in the contract is not evidence of the completion of the building where it appears as a matter of fact that the building was completed some ten days before the date of the certificate. (*Washburn v. Kahler*, 97 Cal. 58, 31 P. 741.)

The completion is a question of fact (*Lumber Co. v. Kremer*, 94 Cal. 205, 29 P. 633) and does not depend upon, nor is it determined by, the giving of an architect's certificate provided for in the contract. The claim of lien, to be enforceable, must be filed within the time required by the statute after the completion. (*McLaughlin v. Perkins*, 102 Cal. 502, 36 P. 839; *Beatty v. Mills*, 113 Cal. 312, 45 P. 468; void contract, *Donnelly v. Adams*, 115 Cal. 129, 46 P. 916.)

The certificate of the architect is not conclusive of the right to the payment of the price. It may be shown that the certificate was obtained by fraud, etc., or that the contractor has not, according to the terms of his contract, earned the payment. (*Dingley v. Green*, 54 Cal. 333; *Holmes v. Richet*, 56 Cal. 309; see sec. 191, *supra*; facts sufficient to show completion of railroad, *Harmon v. Railroad*, 105 Cal. 184, 38 P. 632.)

Notice of the death of the employer, as a general rule, puts an end to an employment from month to month. In order to bring a case within section 1998 of the Civil Code (see also sec. 1996 of the same code) providing for the continuance of services in certain cases upon the death of the employer, the necessary facts must exist, and if they do not exist, a claim of lien for labor must be filed within thirty days after notice of the death of the employer. (*Weithoff v. Murray*, 76 Cal. 508, 18 P. 435.)

Completion of work. Void contracts.

Sec. 269. Prior to the amendment in 1897 of section 1187 (see sec. 289, *infra*) the provisions of that section with reference to occupation, etc., applied only to cases of contracts, that is, valid contracts between the original contractor and the owner, and therefore, when the contract was void the rule laid down by that section did not apply. In such case it was held that, in order to establish the fact of completion, there must be evidence of actual completion and it must be proved like any other fact. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; *Same v. Kremer*, 94 Cal. 205, 29 P. 633; *Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164; *Pierce v. Birkholm*, 115 Cal. 657, 47 P. 681; the statute now applies to all cases; see sec. 289, *infra*.)

A contract to do all of the brick work required in a building which is void by reason of failure to file it for record, is void for all purposes; and a laborer who performs work for the contractor is deemed to have performed it at the personal instance of the owner, and in order to preserve his lien against the owner of the building, he must file his claim of lien within thirty days after the completion of the building; (*Willamette etc. Co. v. Kremer*; *Same v. College Co.*, *supra*;) and the filing of the claim within thirty days after the completion of the brick work contracted for; and prior to the completion of the building, is unauthorized and cannot preserve the lien. (*Davis v. MacDonough*, 109 Cal. 547, 42 P. 450.)

And when, in such case, the assumed contractor abandoned the work under the contract, and the owner finished the building, such claimants for labor and materials, were not required to file their claims of lien within thirty days after cessation of labor by the contractor (the labor not having in fact ceased for thirty days), but could file them within thirty days after the completion of the building. (*Pierce v. Birkholm*; *Marble L. Co. v. Hotel Co.*, *supra*.) The same rules govern the time of filing liens under section 1187 as amended in 1897.

Abandonment of work.

Sec. 270. The abandonment of work upon a building, by a contractor, before its completion, does not necessitate the filing of claims of lien within thirty days thereafter, where the owner goes on with the work and does not occupy or accept the building and there has not been a cessation from labor thereon for thirty days. (*Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164; see *Quale v. Moon*, 48 Cal. 478; *Pierce v. Birkholm*, 115 Cal. 657, 47 P. 681.)

The rule laid down in the last cases is based upon the fact that there had not been a cessation from labor for thirty days; where, however, there has been a cessation of thirty days, a different rule applies.

In *Johnson v. LaGrave*, 102 Cal. 324, 36 P. 651, the original contractor gave to the owner a written notice of his abandonment of the contract and that he declined to proceed further in its execution and thereafter ceased to work upon the building, whereupon the owner contracted with another builder to complete the construction of the building, and it was held that it was incumbent upon those who claimed liens by virtue of the original contract, to file their claims within thirty days after there had been a cessation from labor for thirty days upon the unfinished contract. The court at page 326, said :

"It is immaterial whether the building is subsequently completed by the owner or not, or if completed, whether such completion is effected by the owner directly or through a contract with another; for the purposes of creating a lien thereon through the terms of the unfinished contract, the cessation from labor under that contract for thirty days is a statutory completion of the building, which sets the time running within which the claim of lien must be filed."

Premature filing of claim is fatal to lien.

Sec. 271. A sub-contractor who files his claim of lien for materials furnished for and used in a building, prior to the completion of the building, does not acquire a lien upon the building. (*Perry v. Brainard*, 8 P. 882.)

And the rule is that the premature filing of any claim is fatal to the lien. (*Schwartz v. Knight*, 74 Cal. 432, 16 P. 235; *Roylance v. Hotel Co.*, 74 Cal. 273, 15 P. 777, 20 P. 573; *Lumber Co. v. Olmstead*, 85 Cal. 83, 24 P. 648; *Lumber Co. v. College Co.*, 94 Cal. 229, 237, 29 P. 629; *Lumber Co. v. Sheldon*, 32, P. 234.)

These decisions were made upon section 1187 as it stood prior to the amendment to it of 1887 by which the provisions with reference to trivial imperfections, etc., were added. The rule however is applicable to the present statute. This statute has fixed different events from which the time to file claims of lien begins to run, and if the claim is filed prior to the happening of the event fixed by the statute, it is premature and therefore void.

Where a laborer who performs labor for the contractor (under a void contract) files his claim prior to the completion of the building, it is premature and does not preserve the lien. (*Davis v. MacDonough*, 109 Cal. 547, 42 P. 450.)

So, where a materialman furnished materials to a lessee who caused the building to be erected under a contract the price of which was less than one thousand dollars, and filed his claim before the completion of the building, it was held that such claim was premature and void. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555, s. c. 48 P. 69.)

The same rule applies to claims filed before the expiration of the period of thirty days of cessation from labor. (*Marchant v. Hayes*, 120 Cal. 137, 52 P. 154.)

Claim cannot be filed from time to time as work progresses.

Sec. 272. Neither a contractor nor a subcontractor can, from time to time, as the work progresses, file successive claims of lien for work done on an entire contract. In such case but one lien can be acquired and that must be filed within the time specified in the statute after the completion of the work (or of the contract). (*Cox v. Railroad*, 44 Cal. 18, s. c. 47 Cal. 87; *Dingley v. Green*, 54 Cal. 333, 335.)

Where a canal, consisting of four divisions, but not connected in any way except that they followed the same route of the same pipe line which was not a part of the canal, and separate contracts were made for the construction of each division of the canal, claims of lien may be filed by laborers within thirty days after the completion of the division upon which they have performed labor, whether or not the other divisions have been completed. (*Pacific etc. Co. v. Bear Valley etc. Co.*, 120 Cal. 94, 52 P. 136.)

Where a laborer works by the month, the employment does not terminate at the end of each month, and the laborer is not required to file separate claims of lien within thirty days after the end of each month. (*Malone v. Big Flat etc. Co.*, 76 Cal. 578, 18 P. 772.)

But where the employer of such laborer dies, the laborer must file his claim of lien within thirty days after notice of the death of the employer under sections 1996 and 1998 of the Civil Code. (*Weithoff v. Murray*, 76 Cal. 508, 18 P. 435.)

Notice by owner of completion of work or cessation from labor. The statute.

Sec. 273. Section 1187 of the C.C.P. provides:

[97] "The owner of any property on which labor has been performed, or for which materials have been furnished to be used in the construction, alteration, addition to, or

repair, either in whole or in part, of any work mentioned in section 1183 of this code must, within ten days after the completion thereof, or within forty days after cessation from labor upon any unfinished contract, or upon any unfinished building, improvement or structure, or the alteration, addition to, or the repair thereof, file for record in the office of the county recorder of the county, or city and county, in which such property or some part thereof is situated, a notice setting forth

1. the date when such building, improvement, or structure, or the alteration, addition to, or repair thereof, was actually completed, or

2. in case of cessation from labor for thirty days, the date on which such cessation actually occurred, and said notice shall also contain

3. the name and the nature of the title of the person who caused the said building, improvement, or structure to be erected, or said alteration, addition to, or repair to be made, and also

4. a description of the property sufficient for identification, and said notice must be

5. verified by said owner or some other person in his behalf" * * * [97].

The provisions of section 1187 above quoted were added to that section by the amendment of 1897. (See chap. I, sec. 5, *supra*, for this section in full, amendments thereto and note thereon.)

Notice by owner of completion, etc. Comments on statute.

Sec. 274. Under the lien law as it originally stood the completion of a building or other structure or improvement was, in every case, a question of fact to be determined, like any other question of fact, by the evidence. There was no statutory provision or rule furnishing a positive test of the completion of the work, which, by the statute was made the

event from which the time to file liens began to run, and the completion of the work or of the contract thus became one of the most important events in the whole chronology of the construction of the building or improvement. When a building, etc., should be deemed completed, in contemplation of law, might, therefore, be and usually was made a matter of dispute between the owner on the one hand and lien-claimants on the other, and the decisions of the Supreme Court bear testimony that in many cases lien-claimants have been denied liens for no other reason than that they decided upon the wrong date as that of the completion of the building and consequently filed their claims of lien either too soon or too late.

To remedy this uncertainty in the law, or rather in the application of it to particular facts, and to furnish rules of evidence by which to determine, in most cases, the time of the completion of any building, etc., the legislature in 1887 (stat. 1887, 154) enacted the amendment to section 1187 with reference to trivial imperfections in the work, and also with reference to the use, occupation or acceptance of the building by the owner, and of cessation from labor on any contract. (See *infra* sec. 283 *et seq.*, for these statutory provisions, and also chap. I, sec. 5, *supra*, for section 1187 and amendments.)

This amendment, while it was a much needed improvement upon the former law and furnished rules for the determination of the question of completion, still failed to remove that question from the realm of evidence, and, therefore, of uncertainty, for, under it what was a trivial imperfection and what facts amounted to occupation, use or acceptance by the owner and to cessation from labor for thirty days, were still open for dispute.

In 1897 the legislature attempted to solve this question and to make certain that which had theretofore been very uncertain and unsatisfactory, by the amendment, in that year, to section 1187 (stat. 1897, 202), a portion of which has been quoted in the next preceding section of this chapter.

This amendment makes it the duty of the owner to file for record notice of completion of the building, etc., or of the date of cessation from labor upon any unfinished contract or unfinished building, etc. If the owner files this notice for record, lien-claimants have public notice of the date of completion and may, therefore, with absolute safety, file their claims of lien accordingly. But if the owner fails to file this notice for record, lien-claimants, by the same amendment, must file their claims for record "within ninety days after the completion of said building, improvement or structure, or the alteration, addition to, or repair thereof."

Persons required to file notice of completion or of cessation.

Sec. 275. The statute provides that "the owner of any property on which labor has been performed, or for which materials have been furnished to be used in the construction," etc., of any work mentioned in section 1183 of the C.C.P., must file for record the notice of completion or of cessation required by its provisions.

The language of the provision of section 1187 just quoted, standing alone, might be construed as including every person who has any interest or estate in the property. But it is clear that the "owner" referred to is the person who caused the building, etc., to be erected, that is, the contracting-owner (sec. 43, chap. III, *supra*,) or his successor in interest, at the time the notice is required to be filed. (See sec. 220, *supra*, and sec. 279, *infra*.)

Work for which notice of completion or cessation must be filed.

Sec. 276. Section 1187 of the C.C.P. provides that the owner of any property on which labor has been performed or for which materials have been furnished to be used in the "construction, alteration, addition to, or repair, either

in whole or in part, of any work mentioned in section 1183," must file notice of completion or of cessation for record.

Section 1183 of the C.C.P. here referred to designates the persons who may claim liens and states the work and materials for which such persons may enforce them. No other section of the lien law gives the right to claim or to enforce a lien against the property of the contracting-owner. It would seem, therefore, that this notice must be filed for record by the "owner" in every case in which a lien for work or materials may be claimed and enforced against the property of the "owner,"

Section 1187 contains a special provision with reference to the time within which a claim for labor performed in a mining claim may be filed (see sec. 266, *supra*.) It is not clear that the owner is required to file notice of completion in such case. (See sec. 266 *supra*.)

Time and place of filing.

Sec. 277. Section 1187 of the C.C.P. requires only one notice of completion or of cessation to be filed for record, but the time of filing this notice depends upon the facts of the particular case. If the work has been completed, then the notice must be filed for record within ten days after such completion, but if the work upon any unfinished contract or upon any unfinished building, etc., or upon the alteration thereof, etc., ceases for a period of thirty days, then the notice must be filed for record within ten days thereafter, or in the language of the statute "within forty days after cessation from labor upon any unfinished contract or upon any unfinished building, improvement, or structure, or the alteration, addition to, or the repair thereof."

The statutory time for filing the notice begins to run, therefore, from the completion of the work or from cessation of labor upon any unfinished contract or unfinished building, etc. (For completion see sec. 268 *et seq.*, *supra*, sec. 285, *infra*, sec. 199 *et seq.*, *supra*. For cessation see sec. 293, *infra*.)

The statute requires the notice to be filed for record "in the office of the county recorder of the county or city and county, in which such property or some part thereof, is situated." And another clause of the same statute (sec. 1187) provides that "said notice, when so filed for record must be recorded by the county recorder with whom the same is filed for record, and the fee for recording the same shall be the sum of one dollar."

Statutory requirements of notice of completion or of cessation.

Sec. 278. The facts required to be set forth in the notice of completion or of cessation are specifically and clearly stated in the statute. (See sec. 273, *supra*.)

The necessity of the requirement that the notice must set forth the date of the actual completion of the building, etc., or of the alteration, etc., or the date when the cessation from labor for the period of thirty days actually began, arises from the fact that, when this notice is filed for record, this date fixes the time or the event of completion after which lien-claimants may file their claims of lien. Without the statement of this date in the notice of completion or of cessation, the information furnished by the notice in other respects is practically useless. The object of the amendment in 1897 to section 1187 under consideration was to fix a certain date from and after which claims of lien must be filed.

The notice must also contain "the name and the nature of the title of the person who caused the said building," etc., to be erected, or the alteration, etc., to be made. This does not mean as it literally reads, that the name of the title and the nature of the title must be set forth. Such construction would require useless repetition. The statute means that the notice shall contain the name of the person who caused the building, etc., to be erected, and also a statement of the nature of his title to the property.

The "property" here referred to is the building upon which labor has been performed and for which materials have been furnished, and also, and necessarily, the land upon which such building, etc., has been erected. The nature of the title of the contracting-owner to each of these "properties" must, therefore, be set forth in the notice.

The provisions of the statute with reference to a description of the property and verification of the notice, are the same as those required with reference to the claim of lien and the comments and decisions made upon the latter are applicable to the former. (See secs. 239, 256 of this chapter, *supra*.)

Failure of owner to file notice. Estoppel. The statute.

Sec. 279. Section 1187 of the C.C.P. *inter alia*, provides:

"In case any such owner neglect to file said notice as herein required, within the time herein required, then the said owner and all persons deraigning title from him, and all persons claiming an interest in said property, shall be estopped, in any proceedings brought to foreclose any mechanics' lien or liens provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter." (See chap. I, sec. 5 for section 1187 in full and amendments.)

The same. The person who is estopped.

Sec. 280. The owner referred to in this provision of section 1187 is the contracting-owner (see sec. 275, *supra*), or any other person who deraigns title from him. Cases may occur where the original contracting-owner has transferred his interest under the contract for the construction of a building and in the property upon which it is being

erected. In such case it becomes the duty of the person who stands in the shoes of the original contracting-owner, at the time of the completion of the building or of the cessation from labor, to file the notice of completion or of cessation (see sec. 275 *supra*), and it is this person who, if he neglects to file such notice, is estopped to maintain a defense to enforce a lien upon the property, based upon the ground that the claim was not filed within the statutory time.

Notice of completion, etc. Penalty for failure to file.

Sec. 281. The penalty for failure to file notice of completion, or of cessation for record within the required time, is the estoppel of the person whose duty it was to file such notice, "in any proceedings brought to foreclose any mechanics' lien or liens provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter." (Sec. 1187.)

Under this provision of the statute, the owner is, therefore, free to maintain a defense to such proceeding or suit upon every ground except that the claim of lien of the plaintiff was not filed in time, and this he may do notwithstanding he has failed to file notice of completion or of cessation for record.

The same section (1187) with reference to the time of filing claims, finally provides that "in any event all claims of lien must be filed within ninety days after the completion of said building," etc. It would seem, therefore, that by the clause just quoted, if a claimant failed to file his claim of lien within ninety days after the completion of the building, etc., such failure would be a defense which could be set up by the owner even though the latter had failed to file notice of completion or of cessation.

This construction, however is not entirely free from doubt. The language of the clause first above quoted is

that the owner shall not maintain a defense "based on the ground that said lien or liens have not been filed within the time *provided in this chapter*." This language is broad and if the words used are given their plain, obvious and ordinary signification, the conclusion is inevitable that the owner cannot maintain a defense based upon the ground that the claim of lien was not filed within ninety days after the completion of the building.

The Same.

Sec. 281a. The apparent conflict between these clauses must be reconciled if possible, and it is believed they may be, by ascertaining the intention of the legislature in the enactment in 1897 of the amendment to section 1187 under consideration.

There is nothing in this section to indicate or even suggest that it was the intention of the legislature to do away with all limitation of time within which to file claims of lien. On the contrary, its language shows that its object was to fix a certain and definite time within a certain number of days after which all claims of lien must be filed. If the owner files notice of completion or of cessation, the lien-claimant must file his claim within thirty or sixty days but if no notice is filed by the owner, then section 1187 as it stands under the amendment of 1897, gives to the lien-claimant additional time of thirty or sixty days over that given to him by the provisions of the former statute. The reasons for this extension of time are plain. The exact date of completion of the work or of the contract is often a matter of great uncertainty. The decisions of the courts show that many claimants have been denied liens for no other reason than that their claims were filed either a few days too soon or a few days too late. The additional time given by this amendment removes, in a degree, this uncertainty.

That it was not the intention of the legislature to do away with all limitation of time for the filing of claims where

the owner failed to file notice of completion or of cessation is made apparent when the evils which would arise if there was no limitation, are considered. It may be assumed that the legislature knew that without some positive and certain limitation of time within which all claims of lien must be filed, the title to every piece of property in the state upon which buildings are constructed, would be clouded with the right on the part of some unknown lien-claimant to file his claim of lien at any time after the completion of the building and until his demand was barred by the statute of limitations.

The amendment of 1897 was intended to remedy existing evils rather than to introduce new and greater ones.

The same.

Sec. 281b. Again, if these provisions of the statute are construed as denying the right to the owner who fails to file notice of completion or of cessation to maintain a defense based upon the ground that the claim of lien was not filed within ninety days after the completion of the building, etc., still there is nothing in the statute which would deny to other lien-claimants the right to maintain such defense. It is needless to conjecture the result of this anomaly. There is another rule of construction by which, if there still be doubt, the true intent of the legislature may be ascertained.

The provision that the claimant must, in any event, file his claim within ninety days, etc., is a part of the amendment of 1897 which introduced into section 1187 the clause requiring the owner to file notice of completion or of cessation. An examination of section 1187 will show that this clause is last in order and immediately follows the general provisions requiring claims to be filed within thirty or sixty days. The former clause is, therefore, the last expression of the legislature and the rule is that where there are conflicting provisions of the same statute, the later clause must control unless it otherwise clearly appears from the statute

taken as a whole that it does not express the true intent of the legislature. (Sutherland Stat. Construction, sec. 220.)

To one who carefully reads this section as it now stands this rule will surely appeal as furnishing the true test of legislative intent, for besides being enacted at the same time with the amendment requiring notice of completion or of cessation to be filed, its language is clearly and expressly made to apply to *all claims* and the position of this clause no less than its subject matter, shows that the legislature, notwithstanding it was desirable that the owner "shall" in all cases file notice of completion or of cessation and that if he fails in this respect "shall" be estopped, etc., still considered it of suprema importance that "in any event all claims of lien *must* be filed within ninety days after the completion," etc.

Tested, therefore, by the recognized rules of construction, it is believed that the legislature intended that all claims of lien must be filed within ninety days after the completion, etc., and that the owner is not estopped to maintain a defense based upon the ground that the claim of lien was not filed within that time although he has failed to file notice of completion or of cessation for record. (See Sutherland Stat. Construction, secs. 240, 241, 246.)

In any event all claims must be filed within ninety days after the completion of the building, etc.

Sec. 282. Section 1187 of the C.C.P., *inter alia*, provides:

"Provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof."

The exact number of days within which the claim of lien must be filed for record, is, by the statute, made to

depend upon a contingency and this contingency is the filing of the notice of completion or of cessation by the owner. If the owner files such notice, the claims of the contractor and of all other persons must be filed for record within sixty and thirty days respectively after such filing, but if the owner fails to file such notice for record, then under the provisions of section 1187 just quoted, claims must be filed within ninety days after the completion of the building, etc. (See sec. 281a *supra*.)

The necessity for this provision of the statute is apparent, for, without it and, under the statute as it would then stand with reference to the time of filing claims, if the owner failed to file such notice for record, there would be no limitation of time within which claims must be filed.

It will be observed that, in this clause, the event from which the time to file claims begins to run is the completion of the building, etc. An original contractor, by another clause of the same section, is required to file his claim of lien "after the completion of his contract." Where there are original contractors for separate and distinct departments of the whole work, some of whose contracts are completed before the completion of the whole work, or of the building, etc., the question may arise whether such contractor may file his claim after the expiration of sixty days from the completion of his contract, but within ninety days after the completion of the whole work or of the building, etc.

It would seem that the clause under consideration is intended as an additional limitation of time only and that, therefore, where the owner fails to file notice of completion or of cessation, an original contractor may file his claim at any time after the completion of his contract and within ninety days after the completion of the whole work.

Trivial imperfection. Occupation, use or acceptance of building. Cessation from labor. The statute.

Sec. 283. The last clause of section 1187 of the C.C.P. provides:

[87] "Any trivial imperfection in the said work, or in the construction of any building, improvement or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and [c, 97] in all cases [97] the occupation or use of a building, improvement or structure, by the owner, or his representative, or the acceptance by said owner or his agent of said building, improvement or structure [d] and cessation from labor for thirty days upon any [e] contract, or upon any [f] building, improvement or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter." [87]

The above quoted clause of section 1187 was added to it by the amendment of 1887. (Stat. 1887, 154.) By the amendment of 1897 (stat. 1897, 202), certain matter was stricken from this clause, at the places indicated by letters, as follows:

[c] "in case of contracts;"

[d] "shall be deemed conclusive evidence of completion;"

[e] "unfinished;"

[f] "unfinished."

(See chap. I, section 5, *supra*, for section 1187 in full, amendments thereto, notes thereon, and explanation of figures, letters and brackets.)

Trivial imperfection. Occupation. Use. Acceptance. Cessation from labor. Division of subject.

Sec. 284. Section 1187 of the C.C.P. requires the owner to file for record notice of completion of any building, etc, "within ten ten days after the completion thereof," and notice of cessation from labor upon any unfinished contract or unfinished building, etc., "within forty days after cessation from labor."

The same section also requires the original contractor to file his claim of lien "after the completion of his contract," etc., and every other person "after the completion of any building," etc.

It is also provided by the same section that "in any event all claims of lien must be filed within ninety days after the completion of" any building, etc.

It will be seen, from these statutory provisions, that the amendment of 1897 requiring the owner to file notice of completion, or of cessation, has not dispensed with the determination of the question of completion of the building or other structure or improvement.

It will be in order, then, in the subsequent sections of this chapter, to consider what, under the statute, is a trivial imperfection; what facts, under the statute, amount to occupation, use, or acceptance of the building, and to cessation from labor.

Trivial imperfection. Comments on statute.

Sec. 285. Prior to the amendment of 1887 to section 1187 there were no statutory rules by which to determine when a building or other structure or improvement was completed. The whole matter of completion rested upon the facts of each particular case and if there was a contract for the work the question whether the work was or was not completed was controlled entirely by the contract itself. It was, in other words, a matter of proving performance

according to the terms of the contract and was, therefore, within the general law of contracts.

The rule having been laid down that performance of the contract by the contractor was a condition precedent to his right to a lien, whether or not a particular contract had been performed, became a matter of considerable importance and property owners in many cases, were not loath to interpose the defense of failure of performance of the contract as the shortest and oftentimes the surest method of defeating liens sought to be charged against their property.

The statute with reference to trivial imperfection was not designed to change the law of contracts, or that part thereof which relates to performance, nor to modify the rule which obtains in that law, that a substantial performance of the contract is required in every case as a condition precedent to a right to recover upon it. It was designed to put into statutory form the rule of substantial performance of the contract and to lay down rules of evidence, which were peculiarly applicable to building contracts, and by which to determine the fact of completion. It was not intended, therefore, to make performance out of facts which do not show substantial performance of the contract. It has to do rather with those "trivial imperfections" which notwithstanding the greatest diligence of the contractor, nearly always exist in the construction of buildings and other structures. (See *West Coast L. Co. v. Apfield*, 86 Cal. 335, 341, 24 P. 993, s. c. 22 P. 231; *Bianchi v. Hughes*, 124 Cal. 24, 56 P. 611; *Clark v. Collier*, 100 Cal. 256, 34 P. 677.)

The law will not permit the owner, therefore, to interpose as a legal defense to the suit of a lien-claimant to enforce his lien against the property of the former, that a doorknob called for in the contract, has not been put on a certain door when, in all other respects, the building has been substantially constructed in accordance with the terms of the contract.

Again, and this is one of the reasons of the existence of this law, the completion of the building, or other

structure, has been fixed by the statute as the event within a certain number of days after which (if notice of completion by the owner is not filed) all claims of lien must be filed for record. (*Lumber Co. v. Olmstead*, 85 Cal. 80, 24 P. 648.)

What is trivial imperfection. Substantial performance.

Sec. 286. What is, and what is not, a trivial imperfection depends upon the facts of each particular case. It is a question of fact to be determined by the court, or in a proper case, by a jury. (*Willamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633; *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 229; *Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 P. 686; *Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555, s. c. 48 P. 69; *Coss v. MacDonough*, 111 Cal. 662, 44 P. 325; *Bianchi v. Hughes*, 124 Cal. 24, 56 P. 611.)

In *Barrows v. Knight*, 55 Cal. 155 it appeared that the plaintiff, under a contract with the owner, furnished materials and performed labor upon a building, but that such labor was performed and materials furnished more than sixty days before filing the lien, with the exception of two bolts which were not used in the construction of the building but which (as claimed and found by the court) had been delivered in pursuance of the contract. It was held however, that the sale of the two bolts was outside of the contract and since they were not used in its construction, the work was completed prior to the time of the furnishing the two bolts and that, therefore, the claim of lien was filed too late.

In *Harlan v. Stufflebeem*, *supra*, the contractor completed painting which he was employed by the owner to do upon his buildings. The contractor finished his contract according to its terms, except that some small places in the houses were not properly grained and finished, the cost of finishing of which would not be more than five dollars. It was

contended that this was not a trivial imperfection, but a material and substantial non-performance of the contract. In overruling this contention, the court at page 511, say:

"The performance of a contract need not in all cases be literal and exact, in order to entitle a party to compensation therefor. Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done or the manner of its performance, is the sole matter in dispute, and is to be decided upon conflicting testimony.

"In contracts for the construction or repair of buildings a substantial performance of his contract is sufficient to entitle the contractor to compensation for the work done by him under the contract. If there has been no wilful departure from its provisions, and no omission of any of its essential parts, and the contractor has in good faith performed all of its substantive terms, he will not be held to have forfeited his right to a recovery by reason of trivial defects, or imperfections in the work performed.

"If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action. * * * This rule is especially applicable in a case where the other party has received the benefit of what has been done and is enjoying the fruits of this work." (See *Willamette etc. Co. v. College Co.*; *Bianchi v. Hughes*, *supra*.)

But where the evidence showed that no part of the second coat of paint required by the contract had been put on; that the work-bench of the carpenters and the paint for the second coat were in the building at the time of the fire which destroyed the building; that two of the doors were unhung, and no fastenings put on the front door or windows; and that the building had not been delivered or

accepted, it cannot be held that the building was substantially completed. (*Clark v. Collier*, 100 Cal. 256, 34 P. 677.)

Again, where the claim of lien is filed before the doors of a house were hung, the plumbing finished, the closets and bath-room completed, ventilators placed and mouldings put in, such filing is premature, as such things are not "trivial imperfections," but are necessary to the "completion" of the building. (*Schallert-Ganahl L. Co. v. Sheldon*, 32 P. 234.)

So, marble steps by which the basement of a building is to be reached, is a substantial portion of the building rather than a trivial imperfection, even though its cost was small in comparison with the cost of the whole building. (*Bianchi v. Hughes*, *supra*.)

What is trivial imperfection. Repairs. Continuation of previous work.

Sec. 287. In *Joost v. Sullivan*, 111 Cal. 286, 43 P. 896, the contract was for alterations, additions and repairs of a two-story frame building. There was conflicting testimony as to the exact date of the completion of the work. The court, from the evidence, found, however, that it was completed on a certain day, but the lienors sought to show that subsequent to the date found, certain work had been done upon the building and that the work was not, therefore, completed until a later date. Speaking of this work, the court, at page 292, say:

"Beyreuther completed his contract on October 3rd, and there is no evidence that any work was done on the building after that date, except fixing a closet which made 'a noise,' and which was confessedly the 'repair' of his completed work. Under these circumstances the testimony of the plaintiffs could only be regarded as showing that the building was in a completed state or

condition on the 14th, and not that the work ended on that day, and therefore does not conflict with the positive testimony * * * that it was completed as early as the 10th. Besides the putting on of a door knob which appears to have been mislaid, and of the rim of a bath-tub, were in themselves, 'trivial imperfections' which would not have invalidated plaintiffs' liens if they had been filed on Monday the 12th."

The failure to make the ridge of the roof of a building tight and to putty the glass on the outside, is merely a defective performance of the work and not a failure of completion and is properly disregarded as trivial imperfections. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555, s. c. 48 P. 69.)

So, where a building was erected at a cost of \$4700 and was completed March 7, 1889, with the exception of about \$7 worth of repairs which were made on April 6, 1889, the building was completed on March 7, within the meaning of the statute, and a lien for materials filed more than thirty days after March 7, was not in time. (*Santa Clara etc. Co. v. Williams*, 31 P. 1128.)

In a similar case a contractor agreed to excavate a cellar and to erect walls of cement, and steps to the street and the plaintiffs performed work thereon for the contractor. The work was accepted by the owner as completed July 26; but in August a carpenter employed by the owner placed a frame in the cellar door and plaintiff, at the owner's request, filled a small hole outside of the cellar and it was held that the lack of this work was a trivial imperfection and that a claim for labor filed August 29, was not in time. (*Lippert v. Lasar*, 33 P. 797.)

In *McIntyre v. Trautner*, 63 Cal. 429, the owner objected to the job as not satisfactory and refused to accept it on the ground that the pipes leaked and requested the plaintiff to go and put them in proper shape. The leaking was stopped and the work perfected and it was held that the additional

work done at the request of the owner to complete the previous work, was a continuation of the previous work and that the owner could not be heard to say otherwise and that a claim of lien filed within thirty days after "the leaking was stopped and the work perfected," was filed in time.

What is trivial imperfection. Work called for by plans and specifications.

Sec. 288. Where an elevator was provided for in the plans and specifications of a building and a contract was let for its construction when the other contracts were let, the building is not completed until the elevator is constructed. (*Coss v. MacDonough*, 111 Cal. 662, 44 P. 325.)

In this case, at page 666, the court say:

"Again we have no doubt of the soundness of the trial court's views in holding that the elevator was a substantial and necessary part of the building, and, until the elevator was constructed and placed in position, it could not be said that the building was completed. An elevator was called for by the original plans and specifications; a contract was let for its construction at the same time that other contracts were let. It was attached to the building and formed an integral part thereof. The fact that the building might have been used without it, and that it was a convenience merely, is immaterial. That is not the question. Conceding an elevator in this character of a building to be a mere convenience, which would seem not to be the fact, still conveniences are a material part of the building when provided for by the plans and specifications; and when so provided for, the building is not completed until the demands of the plans and specifications in this regard have been satisfied."

The trivial imperfections mentioned in section 1187 of the C.C.P. refer to imperfect or defective performance of the work upon a building which is claimed to have been completed, and not to a case in which the building is admittedly uncompleted and workmen are still engaged in constructing substantial portions thereof. (*Bianchi v. Hughes*, 124 Cal. 24, 56 P. 611.)

**Occupation, use and acceptance. The statute.
Applies to all cases.**

Sec. 289. Section 1187 of the C.C.P., *inter alia*, provides: "And [c, 97] in all cases [97] the occupation or use of a building, improvement or structure, by the owner, or his representative, or the acceptance by said owner, or his agent of said building, improvement or structure [d] * * shall be deemed equivalent to a completion thereof for all the purposes of this chapter."

This provision of section 1187 as it stood upon the amendment of 1887 (see sec. 283, *supra*) applied only to the "case of contracts" between the original contractor and the owner. It did not apply to contracts void because not filed for record as required by the statute. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; *Same v. Kremer*, 94 Cal. 205, 29 P. 633, s. c. 24 P. 1026; *Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164; *Barker v. Doherty*, 97 Cal. 10, 31 P. 1117; *Joost v. Sullivan*, 111 Cal. 286, 43 P. 896; modifying *Giant P. Co. v. Flume Co.*, 78 Cal. 196, 20 P. 419.)

The amendment of 1897 (stat. 1897, 202) to this section struck out the words "in case of contracts" at the place in the above quoted statute indicated by the letter "c" in brackets, and substituted therefor "in all cases." The statute as it now stands, therefore, applies to all cases, that is, to cases of valid and of void contracts. Claims of lien must now, therefore, be filed within the statutory time after actual completion, or after the occupation, use or acceptance of a building, etc., by the owner.

By the same amendment the words "shall be deemed conclusive evidence of completion" were also stricken out of section 1187 at the place indicated by the letter "d" in brackets, and the provisions of the present statute substituted therefor, which provides that the occupation, etc., shall be deemed equivalent to a completion thereof for all the purposes of the lien law. (See sec. 291, *infra*, as to certificate of architect fixing the time of filing claims of lien.)

Occupation and use by owner.

Sec. 290. Occupation and use of a building by the owner and a tenant, when not explained, is conclusive upon the question of completion. And although the contract may be void for want of record, the occupation of a building by the owner furnishes a test of the completion of the work. (*Joost v. Sullivan*, 111 Cal. 286, 43 P. 896.)

The occupation under this section must be exclusive and inconsistent with a continuation in the completion of the contract, and an occupation by the owner while work is being performed, with full knowledge of the circumstances under which the work is being done, is not sufficient to start the running of the statute as to the time when claims of lien should be filed. (*Orlandi v. Gray* 125 Cal. 327, 58 P. 15.)

The occupation must be open, entire and exclusive. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 239, 29 P. 629.)

Occupation and use by representative of owner.

Sec. 291. Section 1187 of the C.P.P. makes the occupation and use of a building, etc., by the representative of the owner, of the same effect as evidence of completion as his own personal occupation and use.

Where the parties to a building contract agree upon an agent who is authorized by the agreement to accept or reject the work when completed, his acceptance is binding and conclusive in the absence of fraud or mistake. (*Moore v. Kerr*, 65 Cal. 519, 4 P. 542.)

The appointment by the owner of the building of a painter as keeper, and the fact that he lives in the building while painting it, after the contractor has abandoned the work, does not constitute an occupation or acceptance of the building by the owner within the meaning of section 1187 as it stood under the amendment of 1887 which made it applicable only to contracts. (*Marble L. Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164; see sec. 289, *supra*.)

The occupation and use of a building by the owner or his representative is deemed a completion of the work notwithstanding the original contract provides for certificates of the architect stating that the installment of the contract price is due, or work completed, as the case may be, as a condition precedent, to the contractor's right to demand payment and notwithstanding claims of lien were filed within thirty days after final certificate of the architect. (*McLaughlin v. Perkins*, 102 Cal. 502, 36 P. 839; see sec. 268 *supra*.)

Acceptance by owner or his agent.

Sec. 292. Where the parties to a building contract agree upon an agent who is authorized by the agreement to accept or reject the work when completed, his acceptance is binding and conclusive in the absence of fraud or mistake. (*Moore v. Kerr*, 65 Cal. 519, 4 P. 542.)

In *Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 P. 419, the contractor commenced the work under his contract, continued the same for some time but stopped all work and surrendered his contract before completion. The owner accepted the surrender and the structure and works constructed thereunder, and took possession thereof, and continued in the occupation and use thereof, and it was held that such occupation and use brought the case within the provisions of section 1187 as it stood under the amendment of 1887, and was a completion of the work for all the purposes of the lien law, and this whether or not the work contemplated by the contract had been partly or fully completed, and the claim of lien of a materialman filed within thirty days after such acceptance was in time. (See s. c. 88 Cal. 20, 25 P. 976; 97 Cal. 263, 32 P. 172.)

The rule laid down in the decisions made upon section 1187 as it stood upon the amendment of 1887 (see sec. 289, *supra*.) that acceptance of the building, etc., by the owner fixed the time within the statutory time after which claims

of lien must be filed in those cases only in which there was a valid original contract (see *Willamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633), has been changed by the amendment of 1897 to this section which as it now stands, applies to all cases.

The provisions of section 1187 with reference to use, occupation and acceptance by the owner applies not only to buildings but also to any other kind of a structure or improvement in which the materials of a lien-claimant have been used. (*Giant Powder Co. v. Flume Co.*, 88 Cal. 20, 25 P. 976.)

Where a mechanic, engaged by the day to erect a building, under the control of the owner, is discharged by him when the work is on the verge of full and actual completion, the owner undertaking to finish it, such discharge is equivalent to an acceptance of the work as a completed contract for the erection of the building. (*Ward v. Crane*, 118 Cal. 676, 50 P. 839.)

Cessation from labor. The statute. What facts amount to.

Sec. 293. Sec. 1187 of the C.C.P., *inter alia*, provides: "And cessation from labor for thirty days upon any [e] contract, or upon any [f] building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter." (See sec. 283, *supra*.)

Cessation is a question of fact. (*Marble L. Co. v. Hotel Co.*, 96 Cal. 332, 334, 31 P. 164.)

The amendment of 1897 (stat. 1897, 202) struck out the word "unfinished" at the places indicated by the letters "e" and "f" in brackets in the above quoted clause of section 1187. The effect of this amendment was to make the statute applicable to all contracts and to all buildings, etc. The decisions made upon the former statute are still applicable to the present law, both with reference to what

amounts to cessation and the time within which, in such case, claims of lien must be filed for record.

Under this clause of section 1187 as it stood under the amendment of 1887 whenever there had been a cessation from labor, for thirty days upon any unfinished building, the building was deemed completed upon the expiration of the thirty days for the purpose of filing a lien. (*Lumber Co. v. Olmstead*, 85 Cal. 80, 24 P. 648; *Reed v. Norton*, 90 Cal. 590, 27 P. 426; s. c. 26 P. 767; *Marble L. Co. v. Hotel Co.*, *supra*; *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629.)

An abandonment of a contract by the contractor falls within section 1187 and where, in such case, thirty days have elapsed since labor was performed upon the building, the building is deemed completed. (*Johnson v. LaGrave*, 102 Cal. 324, 36 P. 651.)

In the last case, at page 326, the court say that the statute makes the cessation from labor for thirty days upon any unfinished contract equivalent to a completion thereof for all who claim liens by virtue of that contract as fully as though the building was actually completed.

Cessation from labor for the period of thirty days upon an unfinished building, which the owner has not abandoned his intention to complete, fixes the date when and after which it is deemed completed, for all the purposes of claiming liens thereon and claims of lien filed before the expiration of such period are premature and cannot be enforced. (*Marchant v. Hayes*, 120 Cal. 137, 52 P. 154.)

Where work on the building continued upon July 2, 1889, (without completing it) and then ceased for thirty days, a claim of lien filed within thirty days after the expiration of the thirty days of cessation from labor is in time. (*Marble L. Co. v. Hotel Co.*, *supra*.)

In order to constitute a cessation from labor for thirty days within section 1187, the cessation should be of such character as to carry charge of notice to a careful person; and it is not sufficient that there be a mere clandestine

stopping of actual work for thirty days and then beginning it again without any indication to the world that it had been stopped for thirty days. (*Marble Lime Co. v. Hotel Co.*, *supra.*)

And when a claim of lien is assailed on the ground that work had formerly ceased for a period of thirty days before the last cessation of work, the burden is on the owner to show that such cessation actually occurred and it is not enough to show that it might have occurred. (*Marble Lime Co. v. Hotel Co.*, *supra.*)

Willfully false claim forfeits lien. The statute. Construction of.

Sec. 294. Section 1202 of the C.C.P., *inter alia*, provides:

"Any person who shall willfully include in his claim filed under section 1187, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien." * * * (See chap. I, sec. 20, *supra*, for section 1202 in full.)

The provisions of section 1202 just quoted are penal in their character and must not only be strictly construed, but the evidence under which they are invoked, should be clear and convincing that the violation was willful and intentional. (*Schallert-Ganahl L. Co. v. Neal*, 91 Cal. 362, 27 P. 743.)

It was held accordingly, in the last case, that a motion for nonsuit of a claimant's suit to enforce a lien, upon the ground that he knowingly and willfully filed a notice of lien for more than he was entitled to, and sought in the action to receive an amount in excess of the amount actually due, did not state any ground of forfeiture specified in section 1202.

In *Pacific Mutual etc. Co. v. Fisher*, 106 Cal. 224, 235, 39 P. 758, one of the claimants alleged in his complaint that as a part of its claim it had performed work and labor upon

the building in question for which there was an agreement to pay it \$123.35 in addition to paying for the materials which it had furnished. The court found that the claimant furnished the materials but that it had not performed any labor, and allowed its claim for materials alone, and it was urged that the entire claim of claimant should have been rejected by reason of its having included therein the claim for such labor, but the Supreme Court, in upholding the claim, said that the provisions of section 1202 must be strictly construed and that the evidence under which it is invoked should be clear and convincing that the violation was willful and intentional.

Misstatements or mistakes not within the statute.

Sec. 295. Under the express language of this statute, in order to work a forfeiture of the lien, the work and materials included in the claim of lien, must have been so included willfully and intentionally. Therefore, in the absence of any willful intention, a claim of lien will not be rejected merely because it was filed for too much. (*Barber v. Reynolds*, 44 Cal. 519.)

Nor because the claimant has included too much material in his claim, or has set too high a price on it. In such cases the claimant has the right to recover for the value of so much of the material as was actually used in the structure upon which the lien is claimed. (*Harmon v. Railroad*, 86 Cal. 617, 25 P. 124; s. c. 22 P. 407, 23 P. 1024; *Barber v. Reynolds*, *supra*.)

Again, the fact that a claim of lien was in part for articles not the subject of lien, will not vitiate the claim, if it was not willfully false, and the court should permit the claimant, by proof, to make the necessary segregation, throw out the value of such articles, and declare a lien for the remainder. (*Gordon Hardware Co. v. Railroad Co.*, 86 Cal. 620, 25 P. 125; s. c. 22 P. 406, 23 P. 1025.)

Where an overstatement of the amount due on a claim of lien for materials furnished for the erection of buildings, is upon its face, a mere clerical error, it will not invalidate the lien. (*Snell v. Payne*, 115 Cal. 219, 46 P. 1069.)

Nor where there is a mistaken reference to the date of completion of the building. (*Slight v. Patton*, 96 Cal. 384, 31 P. 248.)

But in all cases the statements in the claim, in all essential particulars, must be true. (*Wagner v. Hansen*, 103 Cal. 104, 37 P. 195.)

CHAPTER X.

AMOUNT SECURED BY LIEN.

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The statute.

Sec. 296. Section 1183 of the C.C.P. provides that the persons therein named shall have liens upon the property upon which they have bestowed labor, or for which they have furnished materials, for the value of such labor done, and materials furnished, and that,

“In case of a contract for the work between the reputed owner and his contractor, the lien shall extend to the entire contract price, and such contracts shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price; and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor.”

Another provision of the same section is that such contract when the price thereof exceeds one thousand dollars, shall be in writing, subscribed by the parties and that such contract or a memorandum thereof, shall, before the work is commenced, be filed in the office of the county recorder, etc.,

“otherwise they [it] shall be wholly void, and no recovery shall be thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner and they shall have a lien for the value thereof.” (See sec. 1, for sec. 1183 in full.)

Section 1184 also provides that,

“in case such contracts [that is, original contracts whose price exceeds one thousand dollars] and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof.” (See sec. 2 for sec. 1184 in full.)

Section 1202 contains a provision in nearly the same language as that of section 1183 above quoted, declaring that if the contractor and owner conspire or agree that the written contract shall appear to show the price less than it really is, the contract shall be wholly void, etc. (See sec. 20 for sec. 1202 in full.)

History of legislation. Prior to adoption of Code of Civil Procedure.

Sec. 297. By section 1 of the lien act of 1850 (stat. 1850, 211; 1850-3, 808) a lien was given to the “extent of the labor done or materials furnished, or for both.” Under this act the contract did not operate as a lien in favor of

any person, but if there was a contract, the liability of the owner was limited to the contract price, or to the amount due thereon. (Secs. 2, 3, 4 and 5.)

Under the lien act of 1855 (stat. 1855, 156) the liability of the owner was expressly limited to the amount which he had contracted to pay. (Sec. 3.)

The lien act of 1856 (stat. 1856, 203) while it changed somewhat the procedure for perfecting liens, did not alter the prior statute as to the amount secured by the liens. (Sec. 3.)

In 1858 (stat. 1858, 225), section 3 of the act of 1856 was amended, and as amended provided that the persons therein named should have liens upon the building, etc., regardless of the claims of the contractor against the owner of such building; but if any money was due, or to become due, under the contract from the owner to the contractor, on being served with a notice as provided in a preceding section of the act, the owner could withhold out of the moneys due on the contract, a sufficient sum to cover the liens claimed, etc.

Section 1 of the lien act of 1862 (stat. 1862, 384) expressly limited the liens to the extent of the original contract price and provided that the contract should operate as a lien in favor of all subcontractors, laborers and materialmen. If there was no original contract then lien-claimants were entitled to liens "to the full extent of all labor performed upon, or materials furnished," etc.

Section 1 of the lien act of 1868 (stat. 1868, 589) provided that the persons therein named should have liens "for the work or labor done or materials furnished," and in case of contracts, that the original contractor should be entitled to recover only such amount as might be due to him, according to the terms of the contract, after deducting all claims of other parties for work done and materials furnished. (Sec. 11.)

History of legislation. Since adoption of Code of Civil Procedure.

Sec. 298. Section 1183 as adopted in 1872 provided that every person performing labor upon or furnishing materials to be used, etc., should have a lien for the work or labor done or materials furnished, but that the aggregate amount of such liens should not exceed the amount which the owner would be otherwise liable to pay.

By the amendment to this section in 1874 (amds. 1873-4, 106,) the provision of the original section that the aggregate amount of the liens must not exceed the amount which the owner would be otherwise liable to pay, was stricken out.

The same section was again amended in 1880 (amds. 1880, 63) and as amended provided that the persons therein named should have liens "for the value of such labor done and materials furnished," and that such liens should not be affected "by the fact that no money is due, or to become due, on any contract made by the owner with any other party."

In *Latson v. Nelson*, 11 Pac. C. L. J. 589, this provision was held unconstitutional. It was there said that the amendment enlarged and extended the provisions of section 15, article XX of the constitution of 1879 in that it made the owner liable beyond the terms and limits of his valid contract and that the legislature had not the power to enact such a law.

In 1885 (stat. 1885, 143) this section was again amended by striking out the provision that the liens should not be affected by the act that no money was due or would become due on the contract between the owner and any other party, and substituted the provision which has been quoted in section 296, of this chapter.

The present statute, with reference to the matter under consideration, stands upon the amendment of 1885.

Comments on statute. Division of subject.

Sec. 299. The lien law, as we have already pointed out (chap. VI, sec. 96, *supra*,) gives liens to lien-claimants upon the property upon which they have bestowed labor, or for which they have furnished materials, and also upon the interest in the land of the contracting-owner upon which the building or other structure is situated, provided such person had any interest in the land. (Sec. 102, *supra*.)

The statute does not, however, make the "owner" personally liable to lien-claimants for their work or materials done for or furnished to the original contractor, and no contractual relations exist at all between the owner and the laborers and materialmen of the original contractor. (*Bowen v. Aubrey*, 22 Cal. 566; *Downing v. Graves*, 55 Cal. 544; *Lumber Co. v. Schmidt*, 74 Cal. 625, 16 P. 516; secs. 361, 364, *infra*.)

In view of this fact, the design of the statute is to make the property of the person who receives the benefit of the work, or of the materials, of lien-claimants, that is, the property of the contracting-owner, security for the payment of the claims of such lien-claimants, and it, therefore, provides that where there is no original contract, or no direct contract between the lien-claimants and the owner, the price of which is not expressly agreed upon or otherwise fixed in amount, such lien-claimants shall have liens upon the property upon which they bestowed their labor or for which they furnished their material, "for the value of such labor done and materials furnished." (Section 1183.)

The subject under consideration will therefore be presented under the following heads:

1. The amount secured by lien where there is no original contract, or any other contract whose price is agreed upon or otherwise fixed;
2. The amount secured by lien where the original contract is wholly void under section 1183, or in violation of section 1184, or otherwise void or in violation of the statute;
3. The amount secured by lien where there is a valid original contract.

Where there is no original or other contract the price of which is fixed.

Sec. 300. Where there is no original contract and also where, in any case, the price to be paid for the labor or the materials has not been expressly agreed upon, or otherwise fixed by the parties, the amount secured by all liens is the value of the work done or the materials furnished. Section 1183 expressly so provides, that is to say, that section provides generally that the persons therein named shall have liens for the value of their labor done or of their materials furnished.

Because there is no original contractor, it does not follow that there may not be contracts for labor or materials. The owner may construct his own buildings, and for this purpose, he may directly employ laborers to perform the work upon, and contract directly with materialmen to furnish materials for such building. In such cases the price to be paid for the labor or the materials, if expressly agreed upon by the parties, is the limit of the amount for which liens can be enforced against the property of the owner. Such contracts, like original contracts, measure the rights of the contracting lien-claimant, and he can enforce his lien for the amount only which is due and unpaid according to the terms of his contract.

Where original contract is void or in violation of the statute. Original contractor.

Sec. 301. If the original contract is void under sections 1183 or 1202 of the C.C.P., or in violation of section 1184 of the same code, the original contractor is not entitled to a lien at all. In such cases the statutes expressly excepts him from those to whom it gives the right to liens. (See secs. 70, 71, 296 *supra*.)

Where the original contract is void or in violation of the statute. Laborers and materialmen.

Sec. 302. Where the original contract is void or in violation of the statute, the labor done and materials furnished by all persons except the original contractor, are deemed to have been done and furnished at the personal instance of the owner, or the person who contracted with the contractor, and by the statute, lien-claimants other than the contractor are given liens for the value of such labor and materials. (See secs. 1183 and 1184 quoted, sec. 296, *supra*.)

Where the original contract is invalid, subcontractors, materialmen and laborers are, for the purposes of the lien law, deemed to have contracted directly with the owner, and they may enforce their liens against the property of the owner for the value of their work and materials, though they cannot recover against him personally. (Southern Cal. L. Co. *v.* Schmidt, 74 Cal. 625, 16 P. 516; Kellogg *v.* Howes, 81 Cal. 170, 22 P. 509; Lumber Co. *v.* Gottschalk, 81 Cal. 641, 22 P. 860; Willamette etc. Co. *v.* College Co., 94 Cal. 229, 29 P. 629.)

In such cases the contract is not the measure of the amount of liens which can be enforced against the property of the owner. By the provisions of sections 1183 and 1202 the contract is "wholly void," and there is therefore no contract in existence. By the provisions of section 1184, whatever may be the other effects of a failure to have the contract meet the requirements of that section, it is certain that for the purpose of measuring the amount of liens which can be enforced against the property of the owner, a violation of the latter section differs in no respect from a violation of the former, and that, under either section, liens of subcontractors, materialmen and laborers can be enforced against the property of the contracting-owner only for the value of the work done and materials furnished irrespective of the price of the void or invalid contract. (Dunlop *v.* Kennedy, 102 Cal. 443, 36 P. 765, s. c. 34 P. 92.)

Where there is valid original contract all liens are limited to amount due and unpaid thereon.

Sec. 303. Where there is a valid original contract, section 1183 provides that the contract shall operate as a lien in favor of all persons, except the contractor, "to the extent of the contract price, and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor;" and section 1193 of the same code provides that "the contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished." (For sec. 1193 in full see sec. 11, *supra*.)

The statutes, it will be observed, apply to all contracts between the owner and his contractor, that is to say, to contracts which are required to be filed for record as well as to those which are not required to be filed for record. (*Dennison v. Burrell*, 119 Cal. 180, 51 P. 1; see *Schmid v. Busch*, 97 Cal. 184, 31 P. 893.)

Section 1183 makes the contract a lien to the extent of the contract price. Part of the contract price may, however, have been paid by the owner prior to the time when the claimant served notice to intercept the price in the hands of the owner or when the claimant filed his claim of lien. In such cases the uniform rule has been that liens against the property of the owner could be enforced only for the amount unpaid upon the contract according to its terms. In *Dore v. Sellers*, 27 Cal. 588, it was held that liens could not be enforced for an amount exceeding the sum to become due the contractor from the owner; that employees of the contractor could enforce their liens for the amount due them from the contractor if the same did not exceed the sum for which the contractor had a lien; but if the contractor had paid his subcontractor according to the terms of his contract with him, and had not made premature payments, the employees of the subcontractor were not entitled to demand anything from the contractor or owner.

In such cases the employees of the subcontractor could not intercept any money due from the owner to the contractor, nor could they enforce the lien of the contractor for any of the same, beyond what was due from the contractor to the subcontractor at the time. (See *Davis v. Livingston*, 29 Cal. 283; *Blythe v. Poultney*, 31 Cal. 234; *Knowles v. Joost*, 13 Cal. 620.)

And this rule applies although the joint contractors apportion the job and compensation therefor among themselves by a written contract to which the owner is not a party. In such case it is no defense to an action of a materialman to enforce a lien for materials furnished one joint contractor, that when notice was given there was nothing due the contractor furnished under the apportionment. (*Davis v. Livingston*, *supra*.)

The same.

Sec. 304. The rule was also laid down in *Renton v. Conley*, 49 Cal. 185, that if the owner of the building made payments to the original contractor in good faith, under and in pursuance of the contract with the original contractor, before receiving notice, either actual or constructive, of liens claimed by materialmen or laborers, such materialmen or laborers could not enforce liens on the building for sums exceeding the balance due on the contract when the notice was given. (See *McAlpin v. Duncan*, 16 Cal. 127; *Bowen v. Aubrey*, 22 Cal. 571.)

Or thereafter to become due. (*Davis v. Livingston*, 29 Cal. 283; *Blythe v. Poultney*, 31 Cal. 234; *Shaver v. Murdock*, 36 Cal. 293.)

The amendment in 1874 to section 1183 did not change the rule laid down in these cases. (*Wells v. Cahn*, 51 Cal. 423; *Dingley v. Green*, 54 Cal. 333; *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 237, 29 P. 629.)

In *Dingley v. Green*, *supra*, it was held that the liens of employees of the original contractor were enforceable only

to the extent of the amount due on the original contract and in subordination to its terms; and if the contractor failed to perform his contract or had performed it in part only, and there was nothing due to him according to its terms, or if he had performed and been fully paid, before notice of liens, his employees were not entitled to enforce liens against the property of the owner. (See sec. 307 *et seq.*, *infra*.)

Where a building is constructed under a contract no lien exists in favor of one who furnished materials to a subcontractor beyond the amount due, or to become due, from the owner to the original contractor (*Whittier v. Hollister*, 64 Cal. 283, 30 P. 486), and the same rule applies to all persons furnishing labor or materials. (See *Turner v. Strenzel*, 70 Cal. 28, 11 P. 389; *Latson v. Nelson*, 11 Pac. C. L. J. 589; *O'Donnel v. Kramer*, 65 Cal. 353, 4 P. 204; *Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *Rosenkranz v. Wagner*, 62 Cal. 151; *Gibson v. Wheeler*, 110 Cal. 243, 42 P. 810; *Dennison v. Burrell*, 119 Cal. 180, 51 P. 1; *Henley v. Wadsworth*, 38 Cal. 356; *Shaver v. Murdock*, 36 Cal. 298; *Greig v. Riordan*, 99 Cal. 316, 319, 33 P. 913; sec. 77, *supra*); unless the owner completes the building for less than the contract price. (*Wiggins v. Bridge*, 70 Cal. 437, 11 P. 754; *Dennison v. Burrell*, *supra*; sec. 80, *supra*; sec. 311 *infra*.)

If, however, the owner makes premature payments of the price, liens may be enforced to the extent of the money thus prematurely paid. (*Walsh v. McMenomy*, 74 Cal. 356, 16 P. 17.)

The same.

Sec. 305. Where subcontractors, materialmen and laborers fail to give the notice provided for by section 1184 by which the contract price may be intercepted in the hands of the owner, and the owner makes payments of the price to the contractor according to the terms of the contract between them, the amount of the price which may be subjected to their liens is the twenty-five per cent. thereof,

required to be retained for thirty-five days. (*Dunlop v. Kennedy*, 34 P. 92, overruled in s. c. 102 Cal. 443, but not on this point. See sec. 307 *et seq.*, *infra*.)

But where the contract is one not within the provisions of section 1184 with reference to stipulations of the price in the contract, and the owner pays the full price to the contractor in accordance with the terms of the contract, before receiving notice from laborers and materialmen, under section 1184, intercepting the price in his hands, there is no amount of the price available for liens, nor can the property of the owner be subjected to liens. (*Lumber Co. v. Cummings*, 86 Cal. 22, 24 P. 814.)

And where there are separate original contracts for different departments of the whole work, laborers and materialmen under any one of the original contractors, are entitled to liens to the extent only of the owner's liability under the contract with such contractor. (*Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758.)

(As to the right of attorney's fee in excess of contract price, see sec. 453, *infra*.)

Amount determined as of time when lien is filed or notice given. Limited to amount stated in claim of lien.

Sec. 306. A claimant whose claim is valid is entitled to have it declared good to an amount not exceeding the amount of the contract price in the hands of the contracting-owner when the claim of lien is filed. (*Harmon v. Railroad*, 86 Cal. 617, 25 P. 124, s. c. 22 P. 407, 23 P. 1024; *Turner v. Strenzel*, 70 Cal. 28, 11 P. 389; *Davis v. Livingston*, 29 Cal. 283, 291-2; *Renton v. Conley*, 49 Cal. 185; *Hooper v. Flood*, 54 Cal. 333.)

Where, however, notice of the claim is given, the amount for which the lien may be enforced, is determined as of the time of such notice. (*Dunlop v. Kennedy*, 34 P. 92, overruled in s. c. 102 Cal. 443, but not on this point; *Knowles v. Joost*, 13 Cal. 620.)

The claim of lien must be filed. If it is not filed such failure deprives the lien-claimant of his right to any lien at all. (See sec. 259, *supra*.)

And when the claim is filed the amount stated in the claim is the limit for which it can be enforced against the property of the owner. (See sec. 219, *supra*, section 1188 of the C.C.P., sec. 6, *supra*.)

**Abandonment or failure to perform contract.
Amount applicable to liens. The statute.**

Sec. 307. Section 1200 of the C.C.P. reads as follows:

"In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows:

"From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens." (For notes, etc. to this section, see sec. 18, *supra*.)

Rule prior to enactment of section 1200.

Sec. 308. Prior to the enactment in 1885 of section 1200 the rule had been laid down by the decisions, that the right of the original contractor to a lien depended upon his substantial performance of his contract, and that, therefore, if he failed substantially to perform his contract, or abandoned the same before its substantial completion, he was not entitled to a lien. (See sec. 72 *et seq.*, *supra*.)

The rule had also been laid down that if, according to the terms of the original contract, there was nothing due to the original contractor at the time claims of lien were filed for record or notice given, there could be no liens either in favor of the original contractor or of his subcontractors, laborers or materialmen; for, it was said, if there is no existing lien on the original contract, none exists on the subsidiary contracts of laborers and materialmen. (See secs. 76, 77, *supra*.)

It had also been declared that if the contractor failed substantially to perform his contract, or abandoned the same before its substantial completion, his subcontractors, laborers and materialmen were not entitled to liens unless, according to the terms of the original contract, there was, at the time of such failure or abandonment, something due to the original contractor on the contract price from the owner, or unless the owner, if he chose so to do, completed the building, etc., at a less amount than the balance of the contract price. (See sec. 80, *supra*.)

Rule under section 1200.

Sec. 309. Section 1200 it would seem, has changed the rules mentioned in the next preceding section of this chapter. Under the rules just mentioned, if the original contractor failed substantially to perform his contract, or abandoned the same before its substantial completion, no person was entitled to a lien unless, according to the terms of the contract, there was something due on the contract price to the contractor from the owner at the time of such abandonment. Under these rules it might as it often did happen, under a contract providing for the payment of the price in installments upon the completion of the specified portions of the work, that the contractor abandoned the work after the partial completion of a specified portion of the work. In such case, the prior installments of the price having been paid, there would be nothing due to the orig-

inal contractor from the owner, and, therefore, he would not, nor would any other person, be entitled to a lien against the property of the owner for the work done and materials furnished towards the partial completion of the specified portion of the work. Under this rule, and in the case stated, the owner would gain and the lien-claimants would lose, the value of the work and materials furnished for that part of the specified portion of the work which was partially, but not fully or substantially, completed.

Under section 1200, however, a different result is reached. If, in the case stated, the whole price was made payable in four installments of \$500 each, the three first payable upon the completion of specified portions of the work and the last thirty-five days after final completion thereof, and the original contractor abandoned the work after the substantial completion of the two first specified portions for which he received payment, and the partial completion of the third, the portion of the contract price with which the property of the owner may be charged with liens of all persons, except the original contractor (assuming that the installments made are the value of the work done, and materials furnished,) is the value of the work done and materials furnished for the third specified portion of the work.

Let it be assumed that the value of the work done and materials furnished, at the time of such abandonment, including materials already delivered or on the ground, estimated by the standard of the whole contract price, is the sum of \$1250. The payments already made amount to \$1000. Then, according to the provisions of section 1200, the amount available for the liens of all persons, other than the original contractor, is the difference between these two sums, or \$250.

Constitutionality of section 1200.

Sec. 310. The effect of section 1200 is, in all cases coming within its provisions, to charge the property of the owner with liens of persons other than the owner to the extent in value of the work actually done or of the materials actually furnished by them measured always by the standard of the contract price. If the effect was to charge the property of the owner with such liens beyond the limit of the contract price, it would according to all of the authorities, be unconstitutional. (See secs. 32, 33 *et seq.*, 130, 303-305, *supra*.)

It will be observed that the statutory method of determining the amount for which liens may be claimed against the property of the owner adopts the contract price as the standard. It provides that from the value of the work and materials done and furnished, at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184, and the remainder shall be deemed the portion of the contract price applicable to such liens.

This section, therefore, in so far as it gives liens against the property of the owner, does not contravene the constitutional principle that the contract price is the measure of the owner's liability.

There is another rule declared in a long line of decisions that where there is nothing due to the contractor from the owner, according to the terms of the contract between them, neither the contractor nor his subcontractors, laborers or materialmen can enforce liens against the property of the owner. (Secs. 75, 77, *supra*.)

According to the general law of contracts, a contractor who voluntarily abandons or who fails substantially to per-

form his building contract, cannot recover upon such contract, or at all. (See secs. 72, 80, *supra*.)

Section 1200, therefore, presents the legal anomaly of subjecting the property of the owner to liens in cases where he is under no personal liability upon his contract to the original contractor. And if a personal liability on the part of the contracting-owner to the contractor is a constitutional prerequisite to the right to subject his property to liens, then, clearly section 1200 is unconstitutional. But it is believed there is no such constitutional prerequisite. Under the statute of California the contractor is the agent of the owner for all the purposes of the lien law, and while, in the cases provided for by section 1200, there may be no personal liability upon the contract on the part of the owner to the contractor, yet, by virtue of the statute, the owner is brought into contractual relations with lien-claimants. (Phillips Mec. Liens, sec. 141 *et seq.*, 2nd ed.)

Section 1200 does not, in effect, differ from the provisions of section 1183 which give liens to all persons except the contractor where the contract fails to conform to the requirements of that section, (see sec. 137 *et seq.*;) nor, from the provisions of the same section which give liens for the "value" of labor performed and materials furnished; nor from the provisions of section 1187 which declare that cessation from labor for thirty days, etc., upon any contract, etc., shall be deemed equivalent to a completion thereof for the purposes of the lien law; nor from a law which establishes a rule of damages in a like case.

Scope of section 1200.

Sec. 311. The provisions of section 1200 can be invoked in those cases only where there is an original contract. It is designed for the protection of subcontractors and the laborers and materialmen of the contractor, and where, therefore, there are no lien-claimants of the classes last named, there are no facts to which the provisions of this section are applicable.

Again, this section applies only to cases where the original contractor fails to perform his contract "in full," or abandons the same before completion.

Where the contractor leaves the work without cause it is an abandonment of the contract within this section and the rights of materialmen and subcontractors will be measured by its provisions. (*Golden Gate L. Co. v. Sahrbracher*, 105 Cal. 114, 38 P. 635; see sec. 202, *supra*.)

But where the contractor abandons the work and the owner completes the building or structure called for by the original contract in accordance with its terms, it would seem not to be an abandonment within the meaning of section 1200.

In *Dennison v. Burrell*, 119 Cal. 180, 51 P. 1, the rule was laid down that the liens of mechanics and materialmen could not be claimed for a greater amount than the sum due and unpaid to the contractor; and if nothing was due to the contractor at the time of his abandonment of the contract, and he was to be paid, by the terms of his contract, only upon the completion of the building, liens could not be claimed for a proportional part of the contract price earned at the date of the abandonment by the contractor, unless the owner completed the building for less than the contract price. (See secs. 78, 80, *supra*; *Wiggins v. Bridge*, 70 Cal. 11 P. 754.)

In *Dennison v. Burrell*, *supra*, no mention is made of section 1200. The facts, however, were that the owner completed the building substantially as called for by the contract, and, therefore, it must be held either that the facts of this case did not amount to an abandonment within section 1200, or that the decision is at variance with its provisions. It would seem, however, that section 1200 does not apply to a case where, as in the decision referred to, the owner upon the abandonment of the contract by the contractor, completes the building in substantial conformity with the terms of the contract.

CHAPTER XI.

PRIORITY OF LIEN.

Section.

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The Statute.

Sec. 312. Section 1186 of the C.C.P. reads as follows:

"The liens provided for in this chapter are preferred to any

- [a] Lien,
- [b] Mortgage, or
- [c] Other incumbrance,

which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also to any

- [a] Lien,
- [b] Mortgage, or
- [c] Other incumbrance

of which the lien-holder had no notice, and which was

unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished." (For notes to this section, see chap. I, sec. 4, *supra*.)

Comments on statute. Division of subject.

Sec. 313. Section 1186 of the C.C.P. gives priority to the liens of mechanics in two classes of cases. First, where the lien, mortgage or other incumbrance attaches subsequently to the time when the lien of the mechanic attaches, and secondly, where the lien-claimant has no notice, at the time his lien attaches, of an unrecorded lien, mortgage or other incumbrance.

In the first class of cases the sole fact which determines the priority of the one lien over the other is the time at which the respective liens attached, and in the second, the facts which determine the priority of the one lien over the other are notice or lack of notice by the mechanic of an unrecorded lien, at the time his lien attached to the property.

The time at which the respective liens attach is, therefore, made the test in both cases, by which to determine the priority of the one over the other.

The subject of this chapter will, therefore, be presented under the heads of

- 1 Time when the lien attaches, and herein and firstly of the rule of relation, and
- 2 Notice of unrecorded lien.

Time when lien attaches. Rule of relation.

Sec. 314. Section 1183 gives the right to liens. Section 1187 requires persons who are entitled to, and who claim such liens, to file their claims therefor, within certain specified times. Section 1186 prescribes the time when liens, claims for which have been filed with the proper officer in due form and within proper time, shall attach.

Under section 1186 the lien attaches as of the time when the building, etc., was commenced, work done, or materials were commenced to be furnished. It is clear however, that the mere commencement of the building, or the work, etc., gives but an inchoate right to a lien. Unless, under this section, the lien-claimant is entitled to a lien and perfects his right thereto by filing his claim therefor, no lien attaches at all. When, however, the claim in such case is filed, the lien attaches, as it is said in the decisions, by relation as of the time when the building or the work, etc., was commenced. This has been the rule under all of the lien acts of this state. (*Soule v. Dawes*, 7 Cal. 576; *Tuttle v. Montford*, 7 Cal. 358; *Crowell v. Gilmore*, 13 Cal. 55; *Preston v. Sonora Lodge*, 39 Cal. 116; *McCrea v. Craig*, 23 Cal. 521.)

In some of the earlier decisions a distinction was made between contractors and subcontractors (materialmen, etc.), the court holding that the lien of the former attached as of the time of the commencement of the work, and those of the latter as of the time when notice was given. There is no such distinction under the present law. The question is one solely of priority, and section 1186 establishes the rule for all cases falling within its provisions and for valid as well as for void contracts. (See *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860.)

Under the lien act of 1850 it was held that where a mortgagee informed himself of the nature of the contract between the owner and the builder and took a mortgage of the property subject to it, no subsequent change of the terms of the contract by the owner and builder could create an incumbrance which would have priority of his mortgage. (*Soule v. Dawes*, *supra*.)

Under the lien act of 1862 where there was no written contract, the several liens of the materialmen and laborers did not relate back to the day of the commencement of the building, but each lien related back to and took effect on the

day the particular labor was commenced or the materials began to be furnished. (*Barber v. Reynolds*, 44 Cal. 519.)

Under the lien act of 1858 the lien of a materialman accrued at the time he had the materials which he had contracted to furnish, ready for delivery at the place where he had agreed to deliver them. (*Tibbetts v. Moore*, 23 Cal. 208.)

The same.

Sec. 315. It will be observed that by section 1186 the lien of the mechanic is preferred to every other lien which attaches subsequent to the time when the building, etc., was commenced, work done or materials were commenced to be furnished, etc. This language is susceptible of a construction which would make the lien of the materialman, laborer and subcontractor attach as of the time of the commencement of the work on the building. But it is believed that the true construction is that which makes the lien of the original contractor attach as of the time of the commencement of the work on the building, that of the laborer as of the time of the commencement of his labor and that of the materialman as of the time when he commenced to furnish materials. This rule is the one laid down by the decisions which follow, and would seem to apply both where there is and is not an original contract, though by section 1183 the original contract is made to operate as a lien in favor of all lien-claimants.

Under section 1186 the lien for materials furnished attaches as of the time when the materials were commenced to be furnished. (*Germania etc. Ass'n. v. Wagner*, 61 Cal. 349; *Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758; *Preston v. Sonora Lodge*, 39 Cal. 116.)

The same rule applies to cases of void contracts. (*Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860.)

And it is not changed by the fact that after furnishing materials, other materials are furnished under an express contract. (*Pacific etc. Co. v. Fisher*, *supra*.)

Under the statute, all persons who deal with the property after the commencement, and during the progress of the work, are charged with notice of the claims of lien-claimants. (See *Crowell v. Gilmore*, 13 Cal. 55.) Where under the act of 1862 there was no written contract and there were intervening liens by judgment or otherwise, laborers and others who began their work or commenced to furnish materials prior to the attaching of such lien by judgment or otherwise, were entitled to priority while each person who began his work or commenced to furnish materials after the attaching of such lien, was postponed to such judgment or other intervening lien. (*Barber v. Reynolds*, 44 Cal. 519; *Crowell v. Gilmore*, 18 Cal. 370.)

One contributing labor or materials to a structure which is an appurtenance to a mine, or which when constructed, is to form part of the mine, must be held to have anticipated its use, and cannot therefore claim a lien upon the structure upon the ground that the lien attached before its use in connection with the mine. (*Williams v. M. G. M. Co.*, 102 Cal. 134, 34 P. 702, 36 P. 388.)

Conveyance. Trust deed.

Sec. 316. A transfer of the property by the contracting-owner after the commencement of the work and the furnishing of materials and before the claim of lien is filed for record, does not affect the lien for the work and materials. (*Hotaling v. Cronise*, 2 Cal. 60.)

Where an insurance company loaned the owner of a lot and uncompleted building, money for the purpose of finishing the building, and took from him a deed of trust conveying the fee, defeasible on the payment of the debt, and afterwards knowingly permitted the construction of the building to go on without giving notice that it would not be responsible therefor, it was held that under section 4 of the lien act of 1868 the interest in the property held by the insurance company was subject to mechanics' liens for work and materials done and furnished after the making of the trust deed. (*Fuquay v. Stickney*, 41 Cal. 583.)

Mortgage, generally.

Sec. 317. Under section 9 of the lien act of 1850 (stat. 1850, 211) the lien of a materialman did not take preference over the lien of a prior mortgage. (*Walker v. Hauss-Hijo*, 1 Cal. 184.)

Under the act of 1856 (stat. 1856, 203) where some of the mechanics began their work before a mortgage was executed by the owner upon the property and some of them afterwards, the former would have priority over the mortgage and the latter would not. The first class would be paid in full before the mortgage; then the mortgagee, then the last class—each lienholder having equal claims with the others of his class. (*Crowell v. Gilmore*, 18 Cal. 370.)

In adjusting the conflicting rights of mortgagees, materialmen, laborers, etc., under the act of 1868 (stat. 1868, 589) the rule laid down by the statute is the familiar one in equity that he has the better right who is first in point of time. Therefore, a materialman who commenced furnishing lumber to be used in the construction of a certain building two and one-half hours before a mortgage upon the lot upon which the building was to be erected, was filed for record, has a prior lien under the mechanic's lien law to that of the mortgagee by virtue of his mortgage. (*Preston v. Sonora Lodge*, 39 Cal. 116.)

The liens of the claimants for materials which they commenced to furnish before the execution of either of the mortgages sued on, are properly preferred to and given priority over them. (*Germania etc. Co. v. Wagner*, 61 Cal. 349; *Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758.)

The same.

Sec. 318. Where the complaint in an action to foreclose a lien for materials alleges that the defendants who alone answered had a mortgage on the building and the land but that the mortgage was subordinate and subject to the lien of plaintiff, the burden of showing the priority of the mort-

gage is upon the defendants and if they simply deny the allegations of the complaint and introduce no evidence showing priority, the court is justified in holding that the lien of the mortgage is subordinate and subject to the lien of the plaintiff. (*Harmon v. Ashmead*, 68 Cal. 321, 9 P. 183.)

Where a complaint in an action to foreclose certain mechanic's liens alleges that a mortgage claimed by one of the defendants, which was prior in date to most of the liens, was without consideration, and was executed to defraud the plaintiffs, a finding that the mortgage was without consideration, without a finding upon the question of fraud, will not support a decree ordering the proceeds of the property to be applied first to the payment of the plaintiffs' claims.

In such case, those of the plaintiffs whose liens were subsequent in date to the mortgage could attack it only on the ground that it was made to hinder, delay, or defraud creditors. The mere fact that it was without consideration is not equivalent to this. (*Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

A mortgagee made defendant to a suit to foreclose mechanics' liens who alleges priority of lien and pleads that he has commenced an action to foreclose the mortgage, making the plaintiffs parties defendant, may, if he obtains a decree of foreclosure of his mortgage, *pendente lite* set up such decree by way of supplemental answer upon a retrial of the mechanics' lien suit, and the question as to its effect may be then tried and determined. (*Bewick v. Muir*, 83 Cal. 373, 23 P. 390.)

Prior recorded mortgage.

Sec. 319. A mortgagee in possession has a legal title against the whole world, subject to the rights of the mortgagor; therefore, where he mortgaged the property and subsequently erected a building on it—for the cost of which a mechanic's lien was filed—the holder of the lien cannot

object to the legality of the mortgage in the face of which he contracted. It is not the province of the mechanics in such case to determine the legality of the recorded title but having contracted with notice of the encumbrance, they are postponed till the encumbrance is first paid. (*Ferguson v. Miller*, 6 Cal. 403.)

Under section 1186, the lien of a recorded mortgage or deed of trust takes priority over a subsequent mechanic's lien. (*Williams v. Mining Assn.*, 66 Cal. 193, 5 P. 85; *Walker v. Hauss-Hijo*, 1 Cal. 183; *Kuschel v. Hunter*, 50 P. 397.)

Where the owner of a lot contracted for the erection of a house thereon and agreed to pay certain sums of money as the work progressed, and on its completion, to convey a certain other lot, for which purpose R released a mortgage on the lot, and during the work, the owner of the lot on which the building was being erected, mortgaged it to R, and subsequently on its completion, by agreement with the builders, gave his note for \$10,000 instead of the lot he was to convey; and the builders filed a notice of lien, and assigned the note and lien to plaintiff—so much of the claim as represented the value of the lot which was to have been conveyed, must be postponed to the mortgage. (*Soule v. Dawes*, 7 Cal. 576.)

A prior lien-holder cannot be improved out of his lien, as the result of any contract made between the owner and the contractor, without the consent of such lien-holder. (*Preston v. Sonora Lodge*, 39 Cal. 117; *Fuquay v. Stickney*, 41 Cal. 583, 586.)

Unrecorded mortgage or other encumbrance. Purchase money mortgage.

Sec. 320. Section 9 of the lien act of 1850, (stat. 1850, 213) provided that the lien for work and materials should be preferred to every other lien, or encumbrance which attached upon the property subsequent to the time

at which the work was commenced or the materials were furnished. Under this statute it was held in *Prow v. Rose*, 4 Cal. 173, that an unrecorded mortgage had priority over a mechanic's lien which was based upon work commenced after the execution of the mortgage, but prior to its record, the lien-claimant having notice of the unrecorded mortgage.

In *Guy v. Carriere*, 5 Cal. 511, it was held that the lien of the mechanic did not have priority of a purchase money mortgage. The facts were these: Thompson and Co. were in the possession of the property under a verbal agreement of sale from Guy, and employed Wood to erect a building upon it. Before the completion of the building, Guy signed a deed for the land and at the same time Thompson and Co. executed a mortgage for the purchase money, and it was held that the conveyance and mortgage were but one act, and that no prior lien on the general property of Thompson and Co. could have priority over Guy's mortgage. The decision was put upon the ground that Thompson and Co. had no rights in the property to be affected prior to their acquisition of the title.

The lien of a materialman for lumber furnished for a dwelling will take precedence of a mortgage of the land executed immediately upon a conveyance thereof, but after the time when the materials were commenced to be furnished, notwithstanding the mortgage was given for the purchase price of the land to a vendor who had sold it to the mortgagor prior to the furnishing of any of the materials, and who had conveyed it to the mortgagor on the same day that he received his own deed from a prior vendor from whom he had purchased it.

Section 2898 of the Civil Code, declaring that a mortgage for the price of real property, given at the time of its conveyance, has priority over all other liens created against the purchaser subject to the recording laws, does not give priority to the mortgage over a lien for the building materials furnished to the vendee of the land prior to the conveyance. Such lien has priority over the mortgage under section 1186 of the C.C.P. (*Avery v. Clark*, 87 Cal. 618, 25 P. 919.)

Mortgage to secure future advances. Extra work. Chattel mortgage.

Sec. 321. A mortgage made in good faith to cover future advances of money or materials, or future indorsements, is a valid lien from the date of its execution, if properly recorded, as against subsequent purchasers or encumbrancers, except as to advances made after actual, as distinguished from record, notice of a subsequent encumbrance, though the mortgage does not disclose upon its face that it was given in part for future advances, if the amount of liability is expressly limited, and though the agreement for advances be not in writing. If the mortgage discloses upon its face that it is to secure future advances, the amount need not be set out, and subsequent encumbrancers must ascertain the extent of the lien, or suffer the consequences. (*Tapia v. Demartini*, 77 Cal. 383, 19 P. 641.)

The same rules as to priority of lien of a mortgage to secure future advances and the necessity of actual notice as distinguished from record notice of a subsequent lien, apply to holders of subsequent mechanics' liens, and in favor of a beneficiary not named in the mortgage, who seeks to enforce a lien for advances under a trust created for his benefit in such a mortgage for a sum certain given to another. (*Tapia v. Demartini*, *supra*.)

For extra work on a building by the contractor in pursuance of a general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgage, given by the owner before the extra work was commenced, provided the work was done with the knowledge of the mortgagee and without objection from him. (*Soule v. Dawes*, 14 Cal. 248; s. c. 20 Cal. 523.)

A, the owner of a quartz mill in Amador county, executed a mortgage on the same to B. Afterwards A purchased at Sacramento a steam engine and boiler, and, to secure the purchase price, executed to C a chattel mortgage on the same, and then transported them to Amador

county and placed them in the quartz mill, so that they became a part of the realty, and it was held that C's mortgage on the steam engine and boiler had priority over the mortgage of B. (*Tibbetts v. Moore*, 23 Cal. 208; *Lease*, reserving title, *March v. McKay*, 56 Cal. 85.)

Notice of unrecorded mortgage and other encumbrance.

Sec. 322. Section 1186 provides that the liens of mechanics and others are preferred to any lien, mortgage, or other encumbrance of which the lienor had no notice, and which was unrecorded at the time the building, etc., was commenced, work done, or the materials were commenced to be furnished.

Under this provision, if intermediate the execution and recording of a mortgage, work is commenced upon the mortgaged premises and a mechanic's lien claimed therefor, the lien of the mortgage is superior to the mechanic's lien, unless the mechanic, at the time he commenced his work had no notice of the existence of the mortgage; (*Prow v. Rose*, 4 Cal. 173; *Ferguson v. Miller*, 6 Cal. 403;) and in an action to foreclose the mechanic's lien, there should be a finding up upon the question of notice on the part of the claimant of the mechanic's lien. (*Root v. Bryant*, 57 Cal. 48.)

A mortgage executed by the owners of several mining locations prior to the commencement of work upon the improvement of the consolidated claims as one mine by the mining company, but not recorded until after the cessation of such work, is subordinate to the liens of laborers employed thereon by the mining company, they having no notice or knowledge thereof, as is also a judgment lien docketed against such owners subsequently to such work. (*Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 P. 378.)

If the lien-claimant at the time he commenced his labor had notice of a vendor's lien on the property upon which he performed labor, the vendor's lien will take precedence of his lien for labor. (*Kuschel v. Hunter*, 50 P. 397.)

Attachment, garnishment and execution. The statute.

Sec. 323. Section 1196 of the C.C.P. reads as follows: "Whenever any materials shall have been furnished for use in the construction, alteration, or repair of any building or other improvement, such materials shall not be subject to attachment, execution or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining-claim or other improvement." (For notes to this section, see sec. 14, *supra*.)

Subdivision 16 of section 690 of the same code also provides:

"The following property is exempt from execution, except as herein otherwise specially provided: * * *

"16. All material purchased in good faith for use in the construction, alteration, or repair of any building, mining-claim, or other improvement, as long as in good faith the same is about to be applied to the construction, alteration, or repair of such building, mining-claim or other improvement." (Amdt. of 1899, stat. 1899, 19.)

Attachment and garnishment. The decisions.

Sec. 324. It was said in *Cahoon v. Levy*, 6 Cal. 295, that the statute of 1850 (stat. 1850, 211) was designed for two classes of laborers and contractors. First, contractors or materialmen who contracted directly with the owner of the building himself, and secondly, laborers, subcontractors, etc., who have no privity of contract with the owner. The first class, it was said, have an actual lien under this statute from the commencement of the work until sixty days after its completion; the others have their remedy by giving notice to the owner, and their lien attaches by the service of the notice. It was accordingly held that a garnishment

served on the owner in a suit against the head contractor after the commencement of the building and before notice was served, must prevail over a lien of a subcontractor. (See also *Brennan v. Marsh*, 10 Cal. 436.)

Under the present statute and upon the same facts, the principal case would now be correctly decided directly the opposite. The decision in the principal case was placed upon the ground that the lien of the subcontractor, (materialman,) attached only and when notice of claim was given to the owner. The statute of 1850 contained no provision declaring the time when the lien of the materialman and of others should attach.

Under the present statute the lien of the materialman and of others attaches as of the time when the performance of the labor began or when the materials were commenced to be furnished. (Sec. 315, *supra*.)

Tuttle v. Montford, 7 Cal. 358, which was decided upon the statute of 1856 (stat. 1856, 156) declares the correct rule. It was there said that if the lien of the subcontractor be filed and notice given to the owner within thirty days after the completion of the work, the lien by relation attaches as of the time the work was commenced and takes precedence over a garnishment served on the owner against the head contractor after the work was commenced and before the filing and serving of the notice of lien.

The same.

Sec. 325. General creditors of the contractor cannot, by an ordinary action at law against him and by garnishment served upon the owner (board of education) prior to the expiration of thirty-five days after completion of the building, acquire any rights to the exclusion of lien-claimants, to the twenty-five per cent. of the price required to be reserved and held by the owner for that length of time. A payment within such time either to the contractor, or under a garnishment process to a creditor of the contractor, would not diminish that fund. (*Board of Education v. Blake*, 38 P. 536.)

But it is believed that after the expiration of thirty-five days after the completion of the work or of the contract, the rights of an assignee or of a creditor of the contractor by garnishment process, to the fund as against the lien-claimant, would be determined by the priority of service of notice upon the owner. (See secs. 344, 354, *infra*; sec. 193, *supra*.)

The owner deposited money due the contractor in court. A general creditor who had garnisheed the money in the hands of the owner, a person who had served notice upon the owner under section 1184 of the C.C.P., and the contractor, were ordered to interplead for the same. The contractor failed to set up any claim to the money, and it was held that the money left after satisfying the claim of the person serving notice under section 1184, should be paid to the other creditor and not to the contractor. (*Board of Education v. Blake, supra.*)

Judgments.

Sec. 326. Under the lien act of 1862, (stat. 1862, 384) where there was no written contract for the construction of a building, the several liens of materialmen and laborers did not relate back to the commencement of the building, but each lien related back to and took effect on the day the particular labor was commenced, or the materials were begun to be furnished for which the lien was sought to be enforced.

It was therefore held that the lien of a judgment rendered after labor was commenced or the materials were first delivered, was postponed to the lien of the materialman or laborer, although the labor was completed and the last of the materials were delivered after the judgment was docketed, where such labor was commenced prior to the docket of the judgment. But it was also held that the lien of the judgment was superior to the lien of laborers who commenced work after the docket of the judgment. (*Barber v. Reynolds*, 44 Cal. 519; see sec. 315, *supra*.)

Homestead. The statute.

Sec. 327. Section 1241 of the Civil Code, provides:

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

"1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises;

"2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises;

"3. On debts secured by mortgages," etc.

The last amendment to section 1241 is that of 1887 (stat. 1887, 81) which took effect March 9, 1887. By this amendment the following matter was inserted in subdivision 2, after the word "mechanics:"

"Contractors, subcontractors, artisans, builders, laborers of every class, materialmen's."

Homestead. The decisions.

Sec. 328. Under section 1241 of the Civil Code as it stood prior to the amendment of 1887 (see next preceding section) one who furnished materials for the construction of a building on real property after it had been impressed with a homestead could not obtain a lien thereon for the materials furnished. This section as it then stood did not include the lien of materialmen. (*Richards v. Shear*, 70 Cal. 187, 11 P. 607.)

Prior to the amendment to section 1241 just mentioned, land on which a homestead had been declared after the materials had been furnished for the construction of a building thereon, but before a claim of lien therefor had been filed, was not subject to execution sale in satisfaction of such lien. (*Walsh v. McMenomy*, 74 Cal. 356, 16 P. 17.)

The amendment of 1887 to section 1241 of the Civil Code, it will be observed, has made the homestead premises subject to the lien of a materialman and of the other lien-

claimants therein named. Under this section as it now stands, the lien of a materialman is not defeated by filing a declaration of homestead on the property after the materials were commenced to be furnished and before the claim of lien is filed by the materialman. (Davies Henderson L. Co. v. Gottschalk, 81 Cal. 641, 22 P. 860. See as to the constitutionality of the amendment of 1887, section 33, *supra*.)

CHAPTER XII.

ASSIGNMENT OF LIEN.

Section.

329 LIEN IS ASSIGNABLE.
ASSIGNMENT MUST BE IN
WRITING.

Section.

330-1 Mere right to create lien
cannot be assigned.
332 Assignment by partnership.

Lien is assignable. Assignment must be in writing.

Sec. 329. A mechanic's lien is in the nature of a mortgage—is a charge upon the land, and can only be assigned by instrument in writing. The lien will not pass except by the transfer of the account; and as the account carries with it the lien, which is an incumbrance on the land, or an estate or interest therein, it must be in writing. (*Ritter v. Stevenson*, 7 Cal. 388.)

The assignment of the claim when the existence of the lien does not depend upon possession of the property, passes with it the right to the lien as an incident. (*Duncan v. Hawn*, 104 Cal. 10, 37 P. 626.)

In an action by an assignee to foreclose a lien for materials furnished for and used in the construction of a building, it is not necessary to support a judgment for the plaintiff that the complaint should specifically allege, or that the findings should show, that the assignment of the claim on which the lien is based, was in writing. An allegation and finding that the claim was assigned to plaintiff are sufficient. (*Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890.)

In the last case, the court at page 211 say:

"The rule laid down in *Ritter v. Stevenson* [*supra*], cited to us to support the appellant's contention as to this matter, declares a rule of evidence, for in that case it affirmatively appeared that the assignment of the claim and lien was oral. In this case it does not anywhere appear that the assignment and transfer was oral."

Mere right to create lien cannot be assigned.

Sec. 330. In *Mills v. La Verne Land Company*, 97 Cal. 254, 32 P. 169, the court say:

"The question presented is, not whether a *lien* for work and materials can be assigned, or would pass under an assignment of the debt secured, but whether a laborer or materialman can assign his mere right to assert and create a lien by complying with statutory provisions and clothe the assignee with the power to create a lien for himself; and we are satisfied that he cannot. This question has never been heretofore determined in this state. In *Patent Brick Co. v. Moore*, 75 Cal. 205 * * * the only question involved was whether in an action brought by the assignee of 'a lien,' there should be an averment that the assignment was in writing. The case in our reports which comes the nearest to touching the principle involved is *Godeffroy v. Caldwell*, 2 Cal. 489, where it was held that 'one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the [mechanic's lien] law * * *. The weight of authority is clearly to the point that the said right cannot be assigned * * *."

"Appellant invokes the rule that the assignment of a debt carries with it the lien by which it is secured. But in the first place, that rule is not of universal application; it does not apply for instance, to vendor's liens, or to the many liens which accrue to various kinds of bailees. And in the second

place, at the time of the assignment of the debt to plaintiff in the case at bar, there was no lien securing it in existence; the assignors had merely a personal right to create a lien by complying with the statute. But the statute nowhere confers such a right upon an assignee."

Where a partnership makes a contract for materials used in the construction of a building, it is immaterial to the right of the partnership to file a lien therefor, whether the contract was or was not, completed prior to the retirement of one of the partners of the firm; and the right of the partnership to claim and file a lien for the materials is not destroyed by the extinguishment of one partner's general interest in the partnership, nor is such a case within the rule that the right to create a lien cannot be assigned to a stranger to the transaction. (*Simons v. Webster*, 108 Cal. 16, 40 P. 1056.)

Assignment by partnership.

Sec. 332. A claim of lien filed by a partnership may be assigned in writing in the name of the partnership to one of the partners individually, and the fact that the transfer was made by the plaintiff in the name of the partnership to himself individually is immaterial where the other members of the firm do not object to the assignment, and such assignment is valid as against the owners of the property. (*Pacific etc., Co. v. Fisher*, 109 Cal. 566, 42 P. 154.)

The same rule applies to the right of the partnership to assign to one of the partners the right to create a lien and such case is not within the rule that the right to create a lien cannot be assigned to a stranger to the transaction. (*Simons v. Webster*, 108 Cal. 16, 40 P. 1056.)

CHAPTER XIII.

NOTICE TO OWNER. (SECTION 1184.)

Section.

- 333 Remedies of lien-claimant. Division of subject.
- 334 THE STATUTE. Who may give notice; work and materials for which notice may be given; contents of notice.
- 335 Object of statute.
- 336 The same.
- 337 Nature of remedy.
- 338 Scope of statute. Contracts less than one thousand dollars. Premature payment.
- 339 Scope of statute. Invalid contract. Notice not necessary, but may be given.
- 340 Persons entitled to give notice.
- 341 The same. Buildings constructed for public corporations.
- 342 Person to whom notice must be given.
- 343 Time of giving notice, determines priority upon fund, when.

Section.

- 344 The same. Contract price due but not paid.
- 345 Form and contents of notice.
- 346 What is sufficient notice. Statute and decisions.
- 347 Notice, how given. The statute.
- 348 Effect of notice. Duty of owner. The statute.
- 349 The same. Extent of liability of owner. Decision under earlier statutes.
- 350 The same. Decisions under the code.
- 351 The same.
- 352 The same. The same.
- 353 Amount required to be withheld by owner.
- 354 Assignment of contract price by owner. Effect of. Abandonment by contractor.
- 355 The same.
- 356 False notice forfeits lien. Statute and decisions.

Remedies of lien-claimant. Division of subject.

Sec. 333. Two of the general divisions of the subject under consideration have already been presented in the preceding chapters of this work, namely, (1) Right to Lien, and (2) Perfection of Right to Lien. It now remains to present the third and last division, namely, Remedies or Enforcement of Lien.

The remedies given by the statute for the enforcement of the rights of the persons named in the statute are (1) equit-

able suit to foreclose the lien, and (2) notice under section 1184 by which the contract price in the hands of the owner, belonging to the contractor, may be intercepted and made applicable to the claim of the lien-claimant.

The lien law (section 1197) preserves the common law action by which the lien-claimant in a personal action against the person for whom he has furnished materials or performed labor, may enforce his rights growing out of such contract.

It is proposed in the subsequent chapters of this volume, therefore, to consider the remedies above mentioned. In doing so, however, the chapter on personal action will treat of those matters only which have special bearing upon the lien law.

The statute.

Sec. 334. Section 1184 of the C.C.P., *inter alia*, provides:

* * * "Any of the persons mentioned in section 1183, except the contractor, may at any time give to the [87] reputed [87] owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the [87] reputed [87] owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both." * * *

For explanation of figures and brackets see note 1 to section 1, *supra*. For section 1184 in full, all amendments thereto and notes thereon, see section 2, *supra*.

Object of statute.

Sec. 335. The lien law gives liens to the persons mentioned in section 1183 for their work and materials, in cases where there are original contracts as well as where there are none. In the latter cases the rights of such persons to liens are absolute and the amount of their liens is measured, as the statute provides, by the value of the work done and materials furnished. (*Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860.)

In cases of contracts the right to enforceable liens depends upon the terms of the original contract, that is, upon the fact that according to the terms of the contract, there is something due upon the contract from the owner to the original contractor. If, for instance, the contract price has been paid in full to the contractor, in conformity with the terms of the original contract, subcontractors, materialmen and laborers would not be entitled to enforce liens against the property of the owner for their labor or materials unless they had perfected their rights by giving written notice to the owner, as provided in section 1184, prior to the time when the price or payment thereof became due and payable and was paid to the contractor. (See sec. 76 *et seq.*, *supra.*)

The same.

Sec. 336. The object of the provisions of section 1184 under consideration is to provide an easy and expeditious means of attaching, in the hands of the owner, any money due from him to the contractor. (*Knowles v. Joost*, 13 Cal. 620.) The necessity for some remedy for intercepting the contract price, or an installment thereof, in the hands of the owner and before it may be legally paid to the contractor, is apparent. Without this remedy the amount of the price available for liens of all persons, except the contractor, in case of a contract the price of which exceeds one thousand dollars, would be the twenty-five per cent. required by section 1184 to be reserved for thirty-five days after final

completion of the contract (*Dunlop v. Kennedy*, 34 P. 92, overruled in s. c. 102 Cal. 443, 36 P. 765, but not on this point); and in case of other contracts which were within the provisions of section 1184 with reference to stipulations as to contract price, there would be no amount available for liens where, according to the terms of such contract, the whole price had been paid before notice was given. (*Lumber Co. v. Cummings*, 86 Cal. 22, 24 P. 814), except, of course, in cases of abandonment falling within section 1200. (See sec. 307 *et seq.*, *supra.*)

Nature of remedy.

Sec. 337. The remedy given to lien-claimants, except the contractor, by section 1184 by which, by written notice served upon the owner, they may intercept the contract price due the contractor in the hands of the owner, is one in the nature of an attachment or garnishment. (*Cahoon v. Levy*, 6 Cal. 296; *Brennan v. Marsh*, 10 Cal. 436; *Davis v. Livingston*, 29 Cal. 283, 288.)

The notice is *in invitum* looking to an attachment. (*Davis v. Livingston*, *supra.*)

By giving notice the owner becomes liable to pay the subcontractor, etc., as on garnishment or assignment. (*McAlpin v. Duncan*, 16 Cal. 127.)

The notice has the effect of a garnishment of the moneys coming to the contractor which are in the hands of the owner. (*Bianchi v. Hughes*, 124 Cal. 24, 56 P. 611; *Newport etc. Co. v. Drew*, 125 Cal. 585, 58 P. 187.)

The proceedings under the notice are in the nature of a garnishment whereby there is impounded specific moneys due, or thereafter to become due, to the contractor. (*Sweeney v. Meyer*, 124 Cal. 512, 57 P. 479.)

It is a form of equitable subrogation regulated by statute. It is a cumulative remedy in ordinary cases, but where work has been performed upon and materials furnished for public buildings constructed by municipal corporations which, on grounds of public policy, are exempt from execution and forced sale, it is the only remedy provided by the lien law. (*Bates v. Santa Barbara Co.*, 90 Cal. 543 546, 547, 27 P. 438; *Bianchi v. Hughes*, *supra.*)

Scope of statute. Contracts less than one thousand dollars. Premature Payment.

Sec. 338. The provisions of section 1184 relative to the stipulation in the contract as to time and mode of payment of the price apply only to such contracts when the price exceeds one thousand dollars. (*Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932; *Lumber Co. v. Cummings*, 86 Cal. 22, 24 P. 814; *Dennison v. Burrell*, 119 Cal. 180, 51 P. 1.)

No part of the contract price under a building contract the price of which does not exceed one thousand dollars need be withheld by the reputed owner and he may, in accordance with the terms of his contract, pay the whole of it to the contractor before commencement, or after the completion, of the work, unless the notice prescribed in section 1184 is given in time to intercept the money in the hands of the reputed owner, and in the absence of such notice, the payment of it to the contractor, in accordance with the terms of the contract, will operate as a complete discharge as far as the owner is concerned. (*Lumber Co. v. Cummings*, *supra*.)

When the owner makes premature payments of the contract price to the contractor, no notice is required to render him liable for liens to the extent of such premature payments. (*Sweeney v. Meyers*, 124 Cal. 512, 57 P. 479.)

Scope of statute. Invalid contract. Notice not necessary. But may be given.

Sec. 339. Notice to the owner to stop payments to the contractor is not required unless there is a valid contract. If there is no valid contract, or the contract is void because not recorded, notice to the owner is not necessary, the statute itself being notice to him not to pay the contractor. (*Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860.)

The decisions of the court under prior statutes, so far as they hold that the lien of a subcontractor only extends to

the money unpaid on the original contract, and that the original contract is the measure of the owner's liability, are applicable under the present provisions of the code, so far as relates to cases where there is a valid contract between the owner and original contractor and no further. If the original contract (the price of which exceeds one thousand dollars) is not recorded as provided by the code, the statute and not the contract, measures the extent of the owner's liability to lien-holders, because, in such case, there is no contract. (*Kellogg v. Howes, supra.*)

In the last case it was held that subcontractors, materialmen and laborers, though having actual knowledge of the void contract, could enforce liens for the value of the work or materials, without any reference to the amount remaining unpaid to the original contractor by the owner, and without giving personal notice to the owner to withhold payments due the contractor.

Actual notice by a subcontractor, laborer or materialman of an unrecorded contract, the price of which exceeds one thousand dollars, cannot affect his rights, the question not being one of notice, but of validity of the contract. (*Kellogg v. Howes, supra.*)

Under the provisions of section 1183 and 1184 whether the contract was recorded or not, if proper notice was given, and if sufficient money was then due, or afterwards became due, from the owner to the contractor, to pay the demand of the person giving the notice, it was the duty of the owner to withhold the same from the contractor. (*Russ Lumber Co. v. Garrettson*, 87 Cal. 589, 25 P. 747; *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 P. 438.)

Persons entitled to give notice.

Sec. 340. The persons who may give notice under section 1184, are those, and those only, who are named in section 1183 and who have performed labor or furnished materials for which liens may be claimed. (*Bianchi v. Hughes*, 124 Cal. 24, 56 P. 611.)

But it is not necessary to the exercise of this right or the enforcement of this remedy, that such persons shall file claims of lien. (*Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 P. 438; *First Nat. Bank v. Perris Irrig. Dist.*, 107 Cal. 55, 40 P. 45; *Board of Education v. Blake*, 38 P. 536; *Russ M. & L. Co. v. Roggencamp*, 35 P. 643.)

And this rule applies to individuals as well as to municipal or public corporation owners. (*J. D. Hooker Co. v. West etc. Co.*, Superior Court L. A. Co., Judge Shaw, 1898.)

From the language of section 1184, it is clear that the right to give notice thereunder is confined to the persons named who have performed labor or furnished materials and that, therefore, an assignee of a claim has no right, under the statute, to give such notice. It has been so held.

In *Orange Co. v. Griffith Co.*, (Superior Court of L. A. Co., 1897) Judge Shaw laid down the rule that the right to assert a claim upon the contract price by giving notice under section 1184 was a personal privilege of the person who performed the labor or furnished the materials and was not, therefore, the subject of assignment, and that if the claim was assigned before such notice was given, the right was lost.

The rule was affirmed in principle in *McCrea v. Johnson*, 104 Cal. 224, 37 P. 902, where it was held that an assignee of a claim had no right to serve upon the owner of the building the notice provided for in section 1184.

(For persons entitled to liens, see chap. IV; and for work and materials for which lien may be claimed, see chap. V. *supra*.)

Persons entitled to give notice. Buildings constructed for public corporations.

Sec. 341. A mechanic's lien cannot be acquired against a public building but where a materialman or a mechanic furnishes materials to, or does work for, a contractor for the erection of a county building and gives

written notice to the county of his claim, as provided by section 1184, he acquires a prior right of payment of his claim from the unpaid portion of the contract price. This right as against the contractor does not depend upon the legality of the building contract, or upon the right to acquire a lien.

The equitable garnishment provided for by section 1184 is a cumulative remedy in ordinary cases, but in the above case, it is the only remedy provided by the lien law, because the pursuit of the remedy by foreclosure would involve the taking of buildings which, on grounds of public policy and public necessity, are exempt from execution and forced sale. This remedy is entirely disconnected from and additional to the remedy by lien upon the building. (*Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 P. 438; see *Newport etc. Co. v. Drew*, 125 Cal. 585, 58 P. 187; *Board of Education (v. Blake)*, 38 P. 536.)

Since the decision in the principal case the legislature has enacted two laws, both of which are designed to secure the payment of claims for labor performed and materials furnished for certain public work and improvements. These acts require the contractor to give bond in a sum not less than one-half the contract price, for the benefit of laborers and materialmen and permit them to file claims as the foundation for the right to an action upon the land. (See secs. 22, 22a, *supra*.)

Persons to whom notice must be given.

Sec. 342. The statute provides that notice may be given to the "reputed owner." The word "reputed" was inserted in this section before the word "owner" by the amendment of 1887 (stat. 1887, 153.)

Since the object of giving notice is to intercept the contract price, or some installment thereof, in the hands of the person upon whom it is served, it follows that the person to whom the notice must be given to accomplish this object,

is he who owes the contract price to the original contractor or whom in another place we have called contracting-owner. (Secs. 40, 43 *supra*.)

Under this statute as it stood before the amendment of 1887, the notice was required to be served upon the "owner." The amendment, whatever may have been its design, has not, by inserting "reputed" before "owner" changed the construction which should be placed upon this provision. "Reputed owner" may, under the existence of certain facts and in other provisions of the lien law, mean a person other than the contracting-owner, but it is clear that as used here it means the contracting-owner. (See secs. 42, 43, *supra*.)

A subsequent clause of the same section (1184) refers to the person upon whom the notice has been served as "the person who contracted with the contractor."

Time of giving notice. Determines priority upon fund.

Sec. 343. The statute provides that the notice may be given "at any time." It may be given before the labor is begun or the materials are furnished provided there is an agreement to furnish the labor or materials, or, in other words, the notice may be given at any time after the persons, other than the contractor, mentioned in section 1183, "have agreed" to perform labor or furnish materials.

We have shown in another section (338, *supra*.) that the remedy given by section 1184 by which the contract price due and payable to the contractor, may be intercepted in the hands of the owner, is, in the nature of things, only applicable to cases where there is an original contract. And we have also shown that where, in those cases, the owner pays the contract price to the contractor, in accordance with the terms of the contract, without notice of the claims of subcontractors, materialmen and laborers, the latter cannot enforce their liens against the property of the

owner, except in those cases where twenty-five per cent. of the price is required to be made payable thirty-five days after the final completion of the contract and then only to the extent of the twenty-five per cent., or in the cases falling within section 1200 of the C.C.P., (See sec. 307, *supra*.)

The statute provides that the notice may be given at any time. But it is clear that if, in the case just stated, the notice is given to the owner after he has fully paid the contract price to the contractor, in accordance with the terms of the contract, the property of the owner would not be subject to the liens of such person giving notice, nor would there be a personal liability on his part to them. (See *Lumber Co. v. Cummings*, 86 Cal. 22, 24 P. 814; *Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860; *Bank v. Irrigation District*, 107 Cal. 55, 40 P. 45; *Board of Education v. Blake*, 38 P. 536; *Wells v. Cahn*, 51 Cal. 423.)

Where several notices are served they have priority upon the fund in the hands of the owner in the order of service. Section 1194 of the C.C.P. does not apply to this notice except when a claim of lien is subsequently filed for the demand for which notice has been given. (*Wanka v. Klock*, Superior Court L. A. Co., 1896, Judge Shaw.)

Time of giving notice. Contract price due but not paid.

Sec. 344. So long as the contract price, or any part thereof, remains in the hands of the owner, and notwithstanding its payment is past due according to the terms of the contract, it may be intercepted by notice under section 1184 at any time before payment, but the rights of the persons giving such notice, to the money, will be subject to the equities and rights of third persons which have intervened in the meantime.

The rule was laid down in *Board of Education v. Blake*, 38 P. 536 that the notice, under section 1184, could be given after the expiration of thirty-five days, provided there were funds due the contractor still in the hands of the owner, and in *First Natl. Bank v. Perris I. Dist.*, 107 Cal. 55, 40 P. 45, it was declared that a materialman could give notice to the reputed owner of the structure, of his claim for materials furnished, at any time before the money fell due under the contract, and that no assignment made by the contractor of an amount to become due afterwards to to him in the course of the performance of the contract could, before the arrival of the time of payment, defeat the right of the materialman to give notice and obtain the benefit thereof; and that the notice could be effectually given so long as the money was owed to the contractor himself, although the time when it should have been paid, was passed.

Form and contents of notice.

Sec. 345. Section 1184 further provides that the persons named therein may give written notice,

- [1] "that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or
- [2] that they have agreed to do so, stating in general terms,
- [3] the kind of labor and materials, and
- [4] the name of the person to or for whom the same was done or furnished, or both, and
- [5] the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both." * * *

The statute expressly enumerates the matters which are required to be set forth in the notice. These matters are clearly stated in the statute and comments upon them, therefore, are unnecessary. It should be observed, how-

ever, that the statute provides for two classes of cases—(1) where the labor has been done and the materials have been furnished at the time of giving the notice, and (2) where the labor has not been done and the materials have not been furnished at the time of giving the notice, but there is an unperformed, or a partly unperformed, agreement on the part of the person giving the notice to perform labor or furnish materials. The notice must, therefore, like the claim of lien, set forth the facts as they exist at the time of giving the notice.

The statute does not expressly require the notice to be signed. It must show, however, either from the body or by signature to it by whom it is given and who it is that has performed the labor or furnished the materials. The statute requires this. It provides that the persons named may give notice that *they* have performed labor, etc. (See *Davis v. Livingston*, 29 Cal. 283, 288, where under the act of 1862, it was held that the notice for which our present claim of lien has been substituted, was void because not signed.)

What is sufficient notice. The statute and decisions.

Sec. 346. Section 1184 also provides: "No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters." (For section 1184 in full, amendments and notes, see sec. 2, *supra*.)

The test of the sufficiency of the notice given under this section is whether it informs the reputed owner of the "substantial matters" therein provided, or is sufficient "to put him upon inquiry as to such matters."

In *Wanka v. Klock*, (Superior Court of L. A. Co., No. 25,724, Judge Shaw,) the notice of one of the plaintiffs was in the form of any ordinary account and in the following

words: "Los Angeles, Cal., March 6, 1896. A. B. Klock, Pasadena. To Pioneer Roll Paper Co., Dr. Feb. 7. To Mdse., \$34.43. O.K. A. B. Klock."

On the back of this notice was a printed list of the articles dealt in by the company among which were roofing, felt, sheathing paper, deadening felt, asbestos and roof paint.

Shaw, Judge, in upholding this notice as one substantially complying with the statute, said:

"This notice does not state that the materials furnished Klock by the claimant were for building purposes, or that they were to be used in the building in question, nor does it state the kind of materials, nor does it purport to be a notice to any person. It is a mere bill or statement certified by the debtor to be correct. And yet I believe it to be sufficient to put the owner on inquiry as to all matters required to be stated in the notice. The owner must, of course, be presumed to know that he has a contract for the erection of a building and who the contractor is, and to be aware of all the terms of the contract including all the materials called for by the specifications, and of the payments yet remaining to be made. With this knowledge he is given a paper which informs him that the contractor is indebted to the claimant for goods sold to the contractor by the claimant during the progress of the work; that the claimant deals in goods such as the contractor would need for the building; that the debt is unpaid and that the contractor admits the statement of the indebtedness to be correct."

The court upon this reasoning held that the notice furnished sufficient facts to make it the duty of the owner to make inquiry and, therefore, to charge him with knowledge of all facts which such inquiry would have revealed, and that consequently, the notice was sufficient to meet the requirements of the statute.

Again, in *Orange County v. Griffith Co.* (Superior Court of L. A. Co., 1897, Judge Shaw), the notices consisted of claims against the county of Orange (owner) and made out in the name of, and verified by, the original contractors, for

part of the contract price and in form as required by the law relating to claims against counties (sec. 41, County Gov. Act, 1893, 363). Each demand bore the written endorsement of the contractors transferring the same to a third person who was either a defendant in the action or the assignor of a defendant. It appeared from the evidence, but not from the demand in question, that the sum named in each demand was the exact amount of a debt that was then due the contractors to the assignee named for labor done or material furnished for the jail (the building constructed). Each demand was presented to the board of supervisors of Orange county for allowance, in some instances before and in some instances after the assignment. There was nothing in any of the demands, nor anywhere on the face of the paper as presented to the board, to indicate that the assignee had any claim against the contractors for labor done or materials furnished for or on account of the jail, nor indeed, that he had any claim against the contractors. There was nothing to show that the assignee was a creditor of the contractors. It was held that, upon no possible theory, could such paper be held sufficient to put the owner upon inquiry and that, as a notice under section 1184, it was fatally defective.

Notice, how given. The statute.

Sec. 347 Section 1184 also provides:

"Such notice may be given

[1] by delivering the same to the [87] reputed [87] owner personally, or

[2] by leaving it at his residence or place of business, with some person in charge, or

[3] by delivering to his architects, or

[4] by leaving it at their residence or place of business, with some person in charge, or

[5] by posting it in a conspicuous place upon the mining claim [c, 87] or improvement." [87] (For notes to this section, see sec. 2, *supra*.)

The above provision with reference to posting of notice is similar to that of section 1192 with reference to posting notice by the owner who disclaims responsibility for the construction of buildings, etc., upon his land.

Under the statute last referred to the notice to be valid must be posted in a conspicuous place. (*Silvester v. Coe Quartz M. Co.*, 80 Cal. 510, 22 P. 217.)

A person giving notice under section 1184 is not required to file the notice of his claim in the office of the county recorder as in case of claiming a lien against the property of the owner in order to avail himself of the remedy provided for by that section. (*First Natl. Bank v. Perris I. Dist.*, 107 Cal. 55, 40 P. 45; *Russ M. & L. Co. v. Roggenkamp*, 35 P. 643; *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 P. 438;) and in *J. D. Hooker Co. v. West etc. Co.*, 1898, Judge Shaw of the Superior Court of Los Angeles county, held the rule laid down applied to notice given to individual owners as well as to municipal, or public corporation owners.

Effect of notice. Duty of owner. The statute.

Sec. 348. Section 1184 also provides:

"Upon such notice being given, it shall be the duty of the [d, 87] person who contracted with the contractor [87] to, and he shall withhold from his contractor or from any other person acting under such [87] reputed [87] owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished [e, 87] sufficient [87] money due, or that may become due to such contractor, or other person [f] to answer such claim and any lien that may be filed therefor for record, under this chapter, including [g, 87] counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter" [87]. (For explanation of figures and brackets, see note 1 to sec. 1, *supra*; for section 1184 in full, amendments thereto and notes thereon, see sec. 2, *supra*.)

The amendment of 1887 (stat. 1887, 153) to this section struck out from it as it stood prior thereto, the following provision:

"And all money paid thereafter by the owner to the contractor, or such other person, while such notice is in force, shall, for the purposes of all liens of all persons, except that of the contractor, be deemed a payment prior to the time the same was due within the meaning of and subject to the provisions of this section."

**Effect of notice. Extent of liability of owner.
Decisions under earlier statutes.**

Sec. 349. Under the lien act of 1856 (stat. 1856, 203) the owner of the building could contract to pay for it as soon as completed; and he was not liable to materialmen until notice served upon him and then only to the extent of the sum due the contractor at the date of the notice. (*Knowles v. Joost*, 13 Cal. 620; see *Davis v. Livingston*, 29 Cal. 283, 291-2; settles query raised in *Tuttle v. Montford*, 7 Cal. 358.)

Upon giving the notice, the owner becomes liable to pay the person giving notice as on garnishment or assignment, but if the owner has paid the contractor, according to the terms of his contract, in ignorance of the claims of subcontractors and others, the payment is good. (*McAlpin v. Duncan*, 16 Cal. 127; see *Cahoon v. Levy*, 6 Cal. 295.)

Under the lien act of 1862 (stat. 1862, 384) the employees of a subcontractor could not intercept any money due from the employer to the contractor, nor could they enforce the lien of the contractor, beyond what was due from the contractor to the subcontractor at the time. (*Dore v. Sellers*, 27 Cal. 588; see *Blythe v. Poultney* 31 Cal. 234, 237.)

And if the contractor has paid the subcontractor according to the terms of his contract with him, and has not made premature payments, the employees of the subcontractor are not entitled to demand anything from the contractor or employer. (*Dore v. Sellers*, *supra*.)

Under the same act the liens of materialmen and laborers could be enforced for all sums to be paid the contractor and not due when the notice was given. (*Davis v. Livingston, supra*; *Blythe v. Poultney, supra*; *Shaver v. Murdock*, 36 Cal. 293; *Henley v. Wadsworth*, 38 Cal. 356.)

But under the act of 1868 (stat. 1868, 589) such liens could be enforced only for the balance due on the contract at the time the notice was given. (*Renton v. Conley*, 49 Cal. 185; *Wells v. Cahn*, 51 Cal. 423.)

Effect of notice. Extent of liability of owner. Decisions under the code.

Sec. 350. The amendments to the Code of Civil Procedure concerning liens of mechanics and others adopted in 1874 did not change the rule that if the owner makes payments to the contractor in good faith before receiving notice that a materialman claims a lien for materials furnished the contractor, such materialman can not enforce his lien except for the balance, if any, due the contractor on the contract. (*Wells v. Cahn*, 51 Cal. 423; see *Renton v. Conley*, 49 Cal. 185.)

Under the lien law as it stood in 1884, and prior to the amendments of 1885, a notice by a subcontractor to the owner of a building which was being constructed that a balance was due him on his subcontract from the original contractor, did not impose on the owner the duty of retaining a portion of the contract price to satisfy any lien which the subcontractor might subsequently file. (*McCants v. Bush*, 70 Cal. 125, 11 P. 601.)

Since the amendments of 1885 to section 1184, however, the persons therein named may give to the owner of the building upon which they have performed labor, or for which they have furnished materials, written notice of their claims, and thereupon it becomes the duty of such owner to retain sufficient funds of the contract price due, or to become due to the contractor, to answer such claims.

(*Bates v. Santa Barbara Co.*, 90 Cal. 543, 546, 27 P. 438; *Russ etc. Co. v. Roggencamp*, 35 P. 643; *Bianchi v. Hughes*, 124 Cal. 24, 56 P. 611.)

And if the contract price was less than one thousand dollars and therefore not within the provisions of section 1184 of the C.C.P. with reference to stipulations as to price, and the owner had paid the price in accordance with the terms of the contract, though before or upon completion of the work, but before receiving notice under section 1184, there is no money in the hands of the owner to intercept and therefore none to be withheld by the owner. (*Lumber Co. v. Cummings*, 86 Cal. 22, 24 P. 814.)

Upon the service of such notice and in the absence of any claims upon the money in behalf of other lien-claimants, or assignee of the contractor (see sec. 354, *infra*), the owner is liable to the extent of his liability to the contractor. (*Bianchi v. Hughes*, *supra*; *Bates v. Santa Barbara Co.*, *supra*; *First. Nat. Bank v. Perris etc. Dist.*, 107 Cal. 55, 40 P. 45.)

The same.

Sec. 351. Prior to the amendment in 1887 to section 1184 by which the provision with reference to premature payments was stricken out (see sec. 348, *supra*) no payment of the contract price before the same became due, by the terms of the contract, defeated, diminished or discharged any lien except that of the contractor, and the liability on the part of the owner for a premature payment imposed by this section as it then stood, did not depend on the giving or failure to give the notice referred to in that section. (*Sweeney v. Meyer*, 124 Cal. 512, 57 P. 479.)

The amendment of 1887 just referred to has not, it is believed, changed the rule of the earlier decisions to the effect that the owner cannot, by making premature payments, defeat the right of subcontractors and others to liens, or defeat their right to the remedy provided for in section 1184.

Section 1184, as it now stands, expressly provides that no payment made prior to the time when the same is due, under the terms of the contract, shall be valid for the purpose of defeating, etc., any lien in favor of any person except the contractor.

The same.

Sec. 352. The contract between the materialman and the contractor provided that the deferred payments for the materials furnished should be settled by "notes." This was done and thereafter the materialman served notice upon the owner to withhold payments from the contractor under section 1184 of the C.C.P. The point was made that the notes should be considered as payment for the materials and that, therefore, the materialman was not authorized to intercept the contract price in the hands of the owner by notice. It was held, however, that the notes were only intended to ascertain and evidence the amount due the materialman, and that the notice having been given, it was immaterial to the owner, under the statute, what was the form of the indebtedness from the contractor to the person serving the notice, or what extension of time had been made on it, and whether the debt was due or not, it was the duty of the owner to withhold sufficient money to meet the demand. (*J. D. Hooker Co. v. West etc. Co.*, Superior Court of L. A. Co., Judge Shaw, 1898.)

Payment by the owner to the contractor in excess of the amount called for by the terms of the contract is not to the prejudice of lien-claimants. (*Henley v. Wadsworth*, 38 Cal. 356.)

For priority of right to fund in hands of owner over garnishee, see sec. 325, *supra*.

Amount required to be withheld by the owner.

Sec. 353. Section 1184 provides in this respect that the owner to whom the notice is given "shall withhold from his contractor or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record, under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter."

As this clause stood upon the amendment of 1885, it required the owner to withhold from his contractor, "all" money due, etc. The amendment of 1887 substituted "sufficient" for "all" and struck out before "to answer" in the same clause the words "or sufficient of such money." (See amendments and notes to above quoted clause, sec. 2, *supra*.)

Under this section the amount required to be withheld by the owner is the amount stated in the notice given to him and in addition thereto and "in each case" the sum of one hundred dollars to cover counsel fees besides "reasonable costs provided for in this chapter."

The costs provided for "in this chapter" are "the money paid for filing and recording the lien" (sec. 1195 C.C.P.), and costs of suit "in case of judgment against the owner of the property, upon the lien." (Sec. 1193.)

Assignment of contract price by owner. Effect of. Abandonment by contractor.

Sec. 354. An assignment made by the original contractor to another person or company before the completion of the work vests in the assignee, prior to the expiration of thirty-five days from the date of the completion of the work, no rights different from or superier to those of the original

contractor. (*First Nat'l Bank v. Perris I. Dist.*, 107 Cal. 55, 40 P. 45; *Clemens v. Rebman*, Superior Court of L. A. Co., 1897, Judge Van Dyke; sec. 193, *supra*.)

But if an assignment is made of the balance of the contract price after it has become due and payable under the terms of the contract, with notice to the reputed owner of such assignment, it cuts off all rights of materialmen in the funds so assigned, and any notice afterwards given by a materialman is futile, provided the assignment was without notice of the unpaid demand. (*Bank v. Perris I. Dist.*, *supra*.)

The general rule with reference to latent equities of third persons upon assignment of a demand is applicable to the due and unpaid balance of the price of a building contract and where, in such case, an assignee purchases in good faith and for value, he takes the assignment free of such equities of which he has no notice. (*Bank v. Perris I. Dist.*, *supra*.)

The same.

Sec. 355. A notice given to trustees of a state institution by one who had furnished materials to a contractor under contract with such trustees for the erection of a building, that an amount is still due him for such material, and requiring the trustees to pay him any amount then due, or that shall thereafter become due, to the contractor, operates as a garnishment, and intercepts any payments which the contractor may then or thereafter be entitled to receive, but it does not effect a payment which previously became due and has been transferred for value by the contractor. (*Newport etc. Co. v. Drew*, 125 Cal. 585, 58 P. 187.)

Where a contract with trustees for the erection of a public building required the work to be done to the satisfaction of the trustees, and provided for partial payments as the work progressed, to be made on estimates certified by the superintendent, the trustees retaining ten per cent. of such

estimates until final completion and acceptance of the building, such a partial payment did not become due so as to become subject to disposition by the contractor until the estimates were approved and the amounts ordered paid by the trustees; and an assignment previously made by the contractor of the amount due on an estimate did not become effective until such approval, nor did an assignment of the ten per cent. reserved become effective until final completion and acceptance of the work. (Newport etc. Co. v. Drew, *supra*.)

A materialman who serves the required notice acquires a prior right to the fund in the hands of the owner, due the contractor, though the contractor subsequently abandons the contract and the materialman fails to file his claim of lien for record. (Russ M. & L. Co. v. Roggenkamp, 35 P. 643.)

False notice forfeits lien. The statute and decisions.

Sec. 356. Section 1202 of the C.C.P., *inter alia*, provides:

"Any person who shall willfully give a false notice of his claim to the owner, under the provisions of section 1184, shall forfeit his lien." * * *

(See sec. 20, *supra*, for section 1202 in full and notes thereon.)

The above quoted provision of section 1202 does not refer to the claim of lien required to be filed for record. (Lumber Co. v. Neal, 91 Cal. 362, 27 P. 743.)

The above provision is penal in its character and not only must be strictly construed, but the evidence under which it is invoked should be clear and convincing that the violation was willful and intentional.

A motion for a nonsuit of a claimant's suit to enforce a lien upon the ground that "he knowingly and willfully filed a notice of lien for more than he was entitled to, and sought in the action to recover an amount in excess of the amount actually due," does not state any grounds of a forfeiture by section 1202. (Lumber Co. v. Neal, *supra*.)

CHAPTER XIV.

PERSONAL ACTION.

Section.

357 THE STATUTE.

358 Generally.

359 Personal liability of contractor.

360 The same.

Section

361 When owner personally liable.

362 The same.

363 Prevention of performance.

364 When owner not personally liable.

The statute.

Sec. 357. Section 1197 provides:

"Nothing contained in this chapter [secs. 1183-1203 inclusive of the C.C.P.] shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor." (For notes to this section, see sec. 15, *supra*.)

Generally.

Sec. 358. The lien law, independently of the provisions of this section, would not deprive laborers, mechanics, materialmen and others of their right to personal actions for their labor and material furnished, against the parties liable therefor. As we have pointed out in another place (sec. 144, *supra*) the lien law is based upon the common-law or code contract and was designed for the purpose of giving to the persons named some security for the performance of the contract obligations of the parties to whom they have furnished

labor or materials. This security is a lien upon the property upon or for which they have furnished labor or materials and it has been likened to an attachment or garnishment. (Sec. 24, *supra*.)

It is not the principal thing; it is a mere incident of the debt and like attachment holds the property pending suit and until recovery of judgment upon the debt out of which property the judgment may be satisfied.

The statute, however, has expressly provided that the right to the personal action shall not be impaired by the lien law, and all lien-claimants are free, therefore, to enforce their demands by personal action or by foreclosure of the lien.

The personal action referred to in this section is a simple action upon the contract against the person who purchased the materials or employed the laborer, whether contractor or owner, and has no reference to the lien. (Central L. & M. Co. v. Center, 107 Cal. 193, 40 P. 334.)

Where a lien has expired before the commencement of the action to foreclose it, and judgment of foreclosure was taken by default, it was held not error for the court, of its own motion, on the day following the rendition of the judgment, to modify the judgment to a money judgment only. (Lacore v. Leonard, 45 Cal. 394.)

Personal liability of contractor.

Sec. 359. The lien given by the statute is a remedy provided by law by which, in proper cases, lien-claimants can enforce the payment of their liens. There is nothing in the lien law which takes away the right of the lien-claimant to recover in a personal action against his employer for his labor and materials. The contractor's abandonment of the contract in nowise affects the rights of the laborer or materialman in this respect. On the contrary this right has been uniformly recognized and upheld. (Bates v. Santa Barbara, 90 Cal. 543, 27 P. 438; McMenomy

v. White, 115 Cal. 339, 47 P. 109; *Marchant v. Hayes*, 120 Cal. 137, 52 P. 154; *Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487.)

Where the contract is void for want of record, the contractor is personally liable for labor done and materials furnished at his instance, and personal judgment may be entered against him as a party defendant in an action to foreclose liens therefor against the property of the owner. (*McMenomy v. White*, *supra*; *Wood v. Oakland etc. Transfer Co.*, 107 Cal. 500, 40 P. 806.)

And where laborers employed by a contractor who was working under a void contract not filed for record, have lost their claims of lien, they are entitled to personal judgment only against the contractor. (*Marchant v. Hayes*, *supra*; *Madera Flume etc. Co. v. Kendall*, 120 Cal. 182, 52 P. 304.)

The same.

Sec. 360. So in an action to enforce a lien for work done on a mining claim, when the claim of lien is insufficient because it fails to state the name of the employer, its claimant is entitled to a personal judgment against the contractor for the amount due him, and it is error to grant a motion for non-suit. (*Ascha v. Fitch*, 46 P. 298.)

Section 1193 of the C.C.P. provides that, in case the judgment and costs in the suit of a claimant to foreclose his lien against the owner exceeds the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him in excess of the contract price and for which the contractor was originally the party liable. (See sec. 11, *supra*, for sec. 1193 C.C.P. in full.)

The contractor is also rendered jointly and severally liable with the owner in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by the contract, in case the bond required by section 1203 of the C.C.P. is not filed. (For sec. 1203, see sec. 21, *supra*.)

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Where the contract is void for want of record, the contractor is personally liable for labor done and materials furnished at his instance, and personal judgment may be entered against him as a party defendant in an action to foreclose liens therefor against the property of the owner. (*McMenomy v. White*, *supra*; *Wood v. Oakland etc. Transfer Co.*, 107 Cal. 500, 40 P. 806.)

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The contractor is also rendered jointly and severally liable with the owner in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by the contract, in case the bond required by section 1203 of the C.C.P. is not filed. (For sec. 1203, see sec. 21, *supra*.)

When owner personally liable.

Sec. 361. The owner, of course, is personally liable to his contractor upon his contract with him, and the contractor is entitled to all the remedies pertaining to contracts generally for the enforcement of his rights growing out of such contract, whether the contract is valid or void.

If the contract is void because not filed for record, the contractor may recover a personal judgment against the owner for the value of the work done and materials furnished thereunder, as upon an implied contract.

(*Morris v. Wilson*, 97 Cal. 644, 32 P. 801; see *Spinney v. Griffith*, 98 Cal. 149, 153, 32 P. 974.)

Section 1203 of the C.C.P. renders the owner jointly and severally liable with the contractor in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by the contract, if the owner and contractor fail to file with the contract the bond required by section 1203. (For sec. 1203, see chap. I, sec. 21, *supra*.)

The owner is not personally liable to the subcontractor, etc., of the original contractor. There is no privity of contract between the owner and the subcontractor. (*Bowen v. Aubrey*, 22 Cal. 566; *Davis v. Livingston*, 29 Cal. 283, 287; *Macomber v. Bigelow*, 123 Cal. 532, 56 P. 449; sec. 299, *supra*.)

The neglect of the owner of the building to retain for thirty-five days after the final completion of the work and contract and to pay over to those entitled thereto, twenty-five per cent. of the contract price, renders him responsible to such persons to that extent, less any lawful credits the owner may be entitled to under section 1200 of the C.C.P. (*Reed v. Norton*, 90 Cal. 590, 27 P. 426; s. c. 26 P. 767.)

The same.

Sec. 362. The materialman or mechanic may maintain an action to subject the unpaid portion of the contract price to the payment of his claim (where notice to the owner has been given under section 1184,) without seeking to enforce a lien against the building, and in such action may obtain a judgment for any deficiency there may be against the person to whom the materials were furnished or for whom the work was done. (*Bates v. Santa Barbara Co.*, 90 Cal. 544, 27 P. 438; *Russ M. & L. Co. v. Roggenkamp*, 35 P. 643.)

So where the contract on the part of the contractor has been fully performed. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487.)

Non-payment of an installment of the price when due is such a breach of the contract as to justify a contractor in leaving the work and recovering upon *quantum meruit*; but if the contractor has not performed the contract according to its terms when he demands payment of an installment, then it is not due, and he is not justified in leaving the work. (*Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 114, 38 P. 635; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 500, 35 P. 146.)

So where the owner, before completion of the contract, without cause and in violation of the contract, took possession of the building, ousted the contractor therefrom and refused to permit him to complete the building according to the contract, and appropriated to his own use the material on hand and provided to be used for its construction, the contractor is entitled to treat such contract as rescinded, and to recover the reasonable value of the work performed and materials furnished at the request of the defendant. (*Adams v. Burbank*, 103 Cal. 646, 37 P. 640; *Turner v. Strenzel*, 70 Cal. 28, 31, 11 P. 389.)

For liability of owner upon service of notice under section 1184 of the C.C.P., see chap. XIII, secs. 349-352, *supra*.

When owner personally liable. Prevention of performance.

Sec. 363. The lien being a mere incident of the debt or contract between the contractor and the owner, denying a lien to the contractor in any case does not necessarily deprive him of the right to enforce his contract obligations. A contractor who fails to perform or abandons his contract which in its nature is entire, or fails to perform conditions precedent therein, cannot recover upon such contract at all. Where, however, the owner prevents performance on the part of the contractor, we have seen that under the provisions of the Civil Code, such prevention excuses performance and he is entitled to all the benefits which he would have obtained if the contract had been performed by both parties. (Civil Code, sec. 1512.) But in such case his contract must meet the requirements of the statute. (*Palmer v. White*, 70 Cal. 220, 11 P. 647.)

In *Cox v. Western Pacific R. R. Co.*, 47 Cal. 87, where the owner prevented the contractor from completing the whole contract and was compelled to abandon it, it was held that the contractor in a personal action against the owner, was entitled to recover a fair compensation for the work performed.

In a like case and in a like action it was held that the contractor was entitled to recover against the owner the reasonable value of the work performed and materials furnished at the request of the owner. (*Adams v. Burbank*, 103 Cal. 646, 37 P. 640; see *Joyce v. White*, 95 Cal. 236, 30 P. 524.)

So in *Golden Gate L. Co. v. Sahrbracher*, 105 Cal. 114, 38 P. 635, it was held that non-payment of an installment of the contract price when it was due is such a breach of the contract as to justify the contractor in leaving the work and recovering upon a *quantum meruit*.

And in a proper case, where the owner is in default, the contractor may, in a personal action against the owner,

recover not only the profits he would have made by performance, but is also entitled to recover for expenditures made in preparing to do the work. (*O'Connel v. Main St. Hotel Co.*, 90 Cal. 515, 27 P. 373.)

An action may be maintained for the reasonable value of work done and material furnished, although the value thereof exceeds one thousand dollars; and it is no defense thereto that such implied contract was not filed for record, or that the work was done and furnished in pursuance of a written contract which was not filed for record. (*Rebman v. San Gabriel etc. Co.*, 95 Cal. 390, 30 P. 564.)

When owner not personally liable.

Sec. 364. If, at the time of the lien of a materialman or laborer accrued under the act of 1868, the owner of the premises was not in possession, but the same were in the possession of a lessee whose term had not expired, and who caused the labor to be done or the materials to be furnished, a personal judgment cannot be rendered against such owner in an action enforcing the lien. (*Phelps v. M. C. G. M. Co.*, 49 Cal. 336; see *Worden v. Hammond*, 37 Cal. 61. Where the original contract is void because not filed for record, there is no personal liability on the part of the owner to laborers, etc. (*Kellogg v. Howes*, 81 Cal. 170, 22 P. 509; *McMenomy v. White*, 115 Cal. 339, 47 P. 109; *Madera F. Co. v. Kendall*, 120 Cal. 182, 52 P. 304; *Macomber v. Bigelow*, 123 Cal. 532, 56 P. 449; *Gnekow v. Confer*, 48 P. 331. Nor against his laborers who erect the building. (*Marchant v. Hayes*, 120 Cal. 137, 52 P. 154.)

One who contracts with another for the building of a house, does not thereby incur any liability to the subcontractors of the original contractors, except such as may be fastened upon him by proceedings under the lien law; and therefore, where there has been no assignment, or novation of the contract, an action cannot be maintained (otherwise than under the lien law) by a subcontractor against the owner,

for work and labor done and materials furnished in the construction of the building. (*Downing v. Graves*, 55 Cal. 544.)

And especially where the claimant has not filed his claim of lien, though the original contract is void because not filed for record. (*Lumber Co. v. Schmidt*, 74 Cal. 625, 16 P. 516.)

The contractor cannot recover against the owner unless the subcontractor performs his contract. (*Marchant v. Hayes*, 117 Cal. 669, 49 P. 840.)

The owner of a building is not personally liable for the debts of the contractor to persons furnishing materials to him and is not under obligation to the contractor to pay his debts to the materialmen, without suit, or to anticipate that the contractor will have no defence against him in a suit brought by him to enforce and foreclose his lien. (*Covell v. Washburn*, 91 Cal. 560, 27 P. 859.)

The owner is not personally liable for the debts of the contractor as such to persons furnishing materials to him, and is not under obligations to the contractor to pay his debts to the materialmen. (*Adams v. Burbank*, 103 Cal. 646, 37 P. 640.)

Where the owner has been discharged from his liabilities by judgment in insolvency, there is no personal liability on his part, and a decree in foreclosure of lien adjudging the same, cannot be supported. (*Barber v. Reynolds*, 44 Cal. 519, 537.)

Since the amendment of 1885 to section 1183 of the C.C.P. the contractor cannot maintain an action against the owner to recover damages for not being allowed to complete the building, if the contract is not filed for record as required by that section. (*Palmer v. White*, 70 Cal. 220, 11 P. 647.)

CHAPTER XV.

SUIT TO FORECLOSE LIEN. PLEADING AND PRACTICE.

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Jurisdiction.

Sec. 365. When the plaintiff, in an action to foreclose his lien, alleges facts to establish a valid lien upon the property, and the money demand is less than three hundred dollars, the Superior Court has no jurisdiction of the action. (Miller v. Carlisle, 59 P. 785.)

Since the judgment in favor of lien-claimants must be several in favor of each, their separate claims cannot be aggregated to give the court jurisdiction, where each claim is less than \$300. (Miller v. Carlisle, *supra*.)

In Brock v. Bruce, 5 Cal. 279, the point was made that the county court, as it existed under the act of 1853, May 19th, concerning courts of justice, had no jurisdiction of a

proceeding under the lien law of 1850, (stat. 1850, 211, and supp. act of 1853, stat. 1850-3, 811) to enforce the lien against the property of the owner.

The 9th section of the 6th article of the constitution of 1849 provided that county courts should have such jurisdiction in cases arising in justices courts, and in special cases, as the legislature might prescribe, etc.

The point in the case was whether the proceeding to enforce the lien, under the lien law referred to, was a "special case" of which the legislature might constitutionally give the county court jurisdiction. It was held that such proceeding was not a "special case." The court said:

" * * * The words 'special cases' were intended to embrace those cases that are the creature of the statute, and the proceedings under which are unknown to the general framework of courts of common law and equity. Proceedings to enforce a mechanic's lien (under the act referred to) cannot properly be said to come within this definition. * * * It [the statute] creates a sort of mortgage or security, which follows the original debt or obligation, and which may be enforced upon the chancery side of the district courts precisely as any other species of mortgage or equitable lien in a court of chancery."

(See *Williams v. Walton*, 9 Cal. 143.)

The lien act of 1850 referred to authorized the bringing of suits to foreclose liens. This act, therefore, differed from the lien act of 1861 (stat. 595) which provided for the enforcement of the lien by publication of notice and not by suit. Under the act of 1861 it was held in *McNiel v. Borland*, 23 Cal. 144, and in *VanWinkle v. Stow*, 23 Cal. 458, that the proceeding therein provided for enforcing the lien was a "special case" and therefore that the county court had jurisdiction.

The present lien law authorizes a suit for the foreclosure of the lien, as did the lien law of 1850, and it therefore follows upon the authority of *Brock v. Bruce*, *supra*, (see *Curnow v. Blue G. M. Co.*, 68 Cal. 264, 9 P. 149;) that the Superior Court alone has original jurisdiction of the foreclosure of liens of mechanics. (Sec. 76 C.C.P.)

Jurisdiction. Title to property cannot be tried.

Sec. 366. In an action to foreclose a lien for materials furnished in the improvement of a mining claim against persons in possession of the premises, the lien-claimant cannot dispute the title of the defendant; nor can title be tried in such form of action. (*Williams v. Mountaineer etc. Co.*, 102 Cal. 134, 34 P. 702, 36 P. 388.)

And the same rule applies to a mortgagee in possession. (*Ferguson v. Miller*, 6 Cal. 403.)

In *Worden v. Hammond*, 37 Cal. 61, Treat was the owner of a lot of which Hammond was in possession under a contract of sale from Treat; Worden, plaintiff, erected a building on the lot under a contract made by him with Hammond and brought this action to foreclose his lien therefor and made both Treat, owner, and Hammond, employer, defendants.

The court having under consideration the lien act of 1862 (stat. 1862, 384), at page 65, say:

“Treat does not occupy the position of a mere lien-holder, but he holds the legal title. The plaintiff’s lien, had he acquired one, did not affect the title held by Treat, and his title is not the proper subject of litigation in this action, as the object of the action is to enforce the plaintiff’s lien against Hammond’s interest, and not to assert or determine the respective rights or interests of Hammond and Treat as against each other.”

Jurisdiction. Place of trial.

Sec. 367. Section 392 of the C.C.P. provides:

“Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code:

“3. For the foreclosure of all liens and mortgages upon real property.

"Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action." * * *

(Made applicable by section 1198 of the C.C.P.)

Time within which suit must be commenced. The statute.

Sec. 368. Section 1190 of the C.C.P. reads as follows:

"No lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same, or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit."

(For notes to this section, see sec. 8, chap. I, *supra*.)

Section 2 of the act of 1897 (stat. 1897, 201) entitled "An act to secure the payment of the claims of materialmen, mechanics, or laborers, employed by contractors upon state, municipal or other public work" provides that the action therein given to materialmen, laborers, etc., against the sureties, etc., upon the bond required by the act, may be commenced at any time within ninety days after the filing of their claims as therein provided. (For this act in full, see sec. 22, *supra*. See also similar act with reference to street and sewer work in municipalities, sec. 22a *supra*.)

The same. The decisions.

Sec. 369. An action to foreclose a mechanic's lien must be commenced within ninety days after the liens are filed notwithstanding the insolvency of the debtor. A debt so secured is not provable under the insolvency act, and the commencement of the foreclosure proceedings is not stayed by any of its provisions. (*Bradford v. Dorsey*, 63 Cal. 122.)

An amended complaint based upon the same cause of action relates back to the date upon which the original complaint was filed, as regards the statute of limitations. (*White v. Soto*, 82 Cal. 654, 23 P. 210.)

Section 1190 does not apply to the notice which may be given by materialmen and others to the reputed owner under section 1184 of the C.C.P. (*First Nat'l. Bank v. Perris I. Dist. infra.*)

There can be no foreclosure of a lien until the debt for which the lien is made and held as security has become payable. (*Harmond v. Ashmead*, 60 Cal. 439.)

When, therefore, a contract provides for payment of this price by installments and the reservation of twenty-five per cent. of the price for thirty-five days, a suit brought by a materialman to foreclose his lien prior to the expiration of the thirty-five days, though his claim is filed in time, is premature, all the other payments of the price having been made in accordance with the terms of the contract. (*Brown v. Jordan*, Superior Court, L. A. Co., 1897, Judge Shaw.)

If a credit is given by the terms of the contract, suit must be brought upon the lien within ninety days after the expiration of the credit. (*Knowles v. Baldwin*, 125 Cal. 224, 57 P. 988.)

A suit to enforce a particular lien under the act of 1856 (stat. 1856, 205) was a proceeding to enforce all the liens against the property, and an intervention in such proceeding, if filed within six months, was as much a compliance with the act as an original suit. (*Mars v. McKay*, 14 Cal. 127. Under this act there could be but one suit and this was for the foreclosure of all liens.)

Where a materialman has an entire contract with the contractor to furnish all the iron couplings to be used in the construction of a pipe line at a fixed rate per pound, he cannot enforce payment for any part of the couplings until all necessary for the use indicated have been furnished, or offered to be furnished, and the limitation for action upon the contract does not begin to run until the last delivery of the couplings under the contract in performance of the agreement. (*First Nat'l. Bank v. Perris I. Dist.*, 107 Cal. 56, 40 P. 45.)

The same. When suit is deemed commenced.

Sec. 370. Section 405 of the C.C.P. provides: "Civil actions in the courts of this state are commenced by filing a complaint."

(Made applicable by section 1198 of the C.C.P. for which see sec. 371 *infra*.)

Section 22 of the Practice Act of 1850 as amended in 1855 (stat. 1855, 303), provided that "civil actions * * * shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought and the issuing of a summons thereon."

Section 6 of the lien act of 1856 (stat. 1856, 203) provided that "no lien shall bind any building * * * for a longer period than six months after filing the same unless suit be brought in a proper court within that time to enforce the same," etc.

Section 21 of the limitation act of 1850 provided that "an action shall be deemed commenced within the meaning of this act when the complaint has been filed in the proper court."

Under these statutes it was held in *Flandreau v. White*, 18 Cal. 640, that the mere filing of a complaint was not sufficient to constitute a suit brought within the meaning of the lien acts above mentioned. The filing of the complaint and the issuing of the summons, the court said, were required by the general practice act (sec. 22, *supra*) and the provisions of the limitation act (sec. 21, *supra*) that the filing of the complaint shall be deemed a commencement of the suit, applied only to that act and not to the mechanics' lien law. (See to the same point *Green v. Jackson Water Co.*, 10 Cal. 375; *Van Winkle v. Stow*, 23 Cal. 458.)

Section 405 of the C.C.P. has been substituted for section 22 of the general practice act of 1850, and by the former section, the requirement for the issuing of a summons has been eliminated, so that, under the rulings in the cases cited, an action to foreclose a mechanics' lien, under the present law, is commenced by the filing of the complaint without the issuing of a summons.

Parties, pleading and practice. Rules applicable. The statute.

Sec. 371. Section 1198 of the C.C.P. provides: "Except as otherwise provided in this chapter the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter."

For notes to this section, see sec. 16, *supra*.

The chapter referred to comprises sections 1183-1203 inclusive of the C.C.P.

The provisions of the code referred to comprise section 307-1059 inclusive of the C.C.P.

"Except as otherwise provided in this chapter." The provisions which come within this exception will be noted in their proper places throughout this chapter.

Parties plaintiff. The statute and decisions.

Sec. 372. Section 1195 of the C.C.P., *inter alia*, provides:

"Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them." * * *

For section 1195 in full, amendments thereto and notes thereon, see sec. 13, *supra*.

The meaning of the statute undoubtedly is that any number of persons whose rights to liens have been perfected by filing claims therefor, may join in the same action. Unless the claim of lien is filed in due form and within the proper time there is no foundation for a suit to enforce the lien. In such case there is no lien.

In the absence of this statutory permission, it is believed that lien-claimants could not join in the same action and foreclose their several liens. If, however they were jointly interested in the same claim, the rule would be different.

Under the earlier statutes, lien-claimants whose claims were several and without community of interest, were permitted to join in the same equitable suit to foreclose them. (*Barber v. Reynolds*, 33 Cal. 497, s. c. 44 Cal. 519.)

And the rule is the same under the present statute.

In *Hooper v. Flood*, 54 Cal. 218, four of the persons claiming liens united as original plaintiff and another was permitted to come in as an intervenor. Each of the plaintiffs stated his cause of action in an independent count and it was held that there was no serious objection to such practice. (See *Parker v. Mining Co.*, 61 Cal. 348; *Malone v. Mining Co.*, 76 Cal. 578, 18 P. 772.)

A perfected lien may be assigned. (See sec. 329, *supra*.) The assignee, therefore, of such a claim is the proper party to bring suit to foreclose the lien.

Necessary and proper parties defendant generally.

Sec. 373. All persons interested in the premises prior to the suit brought to foreclose a mortgage or to enforce a mechanic's lien, whether purchasers, heirs, devisees, remaindermen, reversioners, or incumbrancers, must be made parties, otherwise their rights will not be affected. (*Whitney v. Higgins*, 10 Cal. 547; *Hocker v. Kelly*, 14 Cal. 165; *Gamble v. Voll*, 15 Cal. 508.)

All persons claiming liens should be made parties. (*Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 P. 419.)

The rule was laid down in *Whitney v. Higgins*, (554), *supra*, that the principles which govern as to parties in suits foreclosing mortgages apply equally to suits for the enforcement of the liens of mechanics.

"It has been the constant and uniform practice ever since we had a lien law in this state for the benefit of materialmen and others, in actions for the foreclosure of such liens, to make the owner and contractor parties defendant, and to unite a personal action against the contractor for the money, with the action to establish the lien and for its foreclosure against the owner. The practice is much to be commended, in that it prevents a multiplicity of such suits, and thus

saves labor and expense * * *. This constant and uniform procedure continued for so long a time is strongly persuasive that the practice is correct. *Cursus curiae est lex curiae.*" (Giant Powder Co. v. Flume Co., *supra*, see secs. 374 and 375, *infra*, of this chapter.)

Parties defendant. The owner.

Sec. 374. The rights of the owner of the property cannot be affected by a sale under foreclosure suit to which he is not a party. (March v. McKoy, 56 Cal. 85.)

The owner of the land (reversioner) is improperly made a party to a suit to foreclose a mechanic's lien brought by the plaintiff who made a contract with his contracting-owner to erect a building for him on land of which he was in possession under a contract of sale from the owner (reversioner). (Worden v. Hammond, 37 Cal. 61.)

Parties defendant. The contractor.

Sec. 375. Under the provisions of sections 1193, 1194 and 1195 of the C.C.P. it was the intent of the lawmakers that in an action to enforce a lien under this statute, all the persons claiming liens under the statute, including the contractor and owner, should be made parties, so that there might be a complete determination of all matters in controversy between the materialman and other lienholders, the owner and the contractor, and in this point of view the contractor is a necessary party; and if he is not made a party, the court should order him to be made a defendant that there may be a full and complete determination of the matters in controversy. (Giant Powder Co. v. Flume Co., 78 Cal. 193, 200, 20 P. 419; see next section.)

When the contractor is personally liable for the debt, section 1194 just referred to, authorizes making him a defendant along with the owner. (Giant Powder Co. v. Flume Co., *supra*.)

The contractor is a proper, but not a necessary party in an action to enforce a lien against the property of the owner. (*Yancy v. Morton*, 94 Cal. 558, 29 P. 1111; *Hooper v. Flood*, 54 Cal. 218.)

A complaint in an action to foreclose mechanics' liens which alleges that the contract between the owner of the property and the original contractor was void, upon the ground that neither the contract, nor a memorandum thereof, was filed with the county recorder, is not demurrable for a misjoinder of parties defendant in making the original contractor a party defendant in the action, and he, being alone personally liable for any deficiency which may arise after the foreclosure of the liens, is properly joined as a party defendant if a personal judgment against him is, for any reason, desired. (*Wood v. Oakland etc. Co.*, 107 Cal. 500, 40 P. 806.)

Parties defendant. When contractor not necessary party.

Sec. 376. A contractor is not a necessary party to an action by a materialman to enforce his lien against the owner of the premises, for materials furnished the contractor, so far as the rights of the owner of the building are concerned; and an amendment by the plaintiff to his complaint making the contractor a party, after the statutory time for commencing the action has passed, cannot prejudice the owner of the premises. (*Green v. Clifford*, 94 Cal. 49, 29 P. 331; *Russ L. Co. v. Garrettson*, 87 Cal. 596, 25 P. 747.)

A contractor is not a necessary party to an action to enforce liens for labor and materials furnished after the abandonment by the contractor of his contract. (*Green v. Clifford*, *supra*.)

While the contractors are proper parties to an action by materialmen to enforce their liens, they are not necessary parties, and the owner of the property cannot complain upon appeal because they were not joined as co-defendants, where he has not asked the trial court for an order to have them so joined. (*Yancy v. Morton*, 94 Cal. 558, 29 P. 1111.)

Parties defendant. Partnership firms.

Sec. 377. If a mechanic, in his claim of lien filed under the act of 1868, states the name of the person by whom he was employed, and it turns out that such person was a member of a firm, and that such person employed him on behalf of the firm, the mechanic, in an action to enforce the lien, may and should make all the members of the firm defendants, notwithstanding the name only of the one to whom he was employed appears in the claim of lien filed with the recorder. (*McDonald v. Backus*, 45 Cal. 262.)

Where two tenants as copartners have erected a building upon leased land, and one of them has died before the bringing of an action to foreclose a lien in favor of those who furnished material for the building, where no judgment is sought against the estate of the deceased partner, it is not error to refuse to continue the case, and make the executor of the deceased partner a party as the surviving partner is fully authorized to defend for the partnership interest. (*West Coast L. Co. v. Apfield*, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231.)

In *Bolen v. San Geronio F. Co.*, 55 Cal. 164, it was alleged in the complaint that the defendants were partners under the firm name of San Geronio Fluming Co. The company, a corporation, answered, and set up the fact of its incorporation and alleged title to the property. Judgment was rendered for the sale of the property, and it was held that the corporation had not been made a party to the suit and that the judgment as to it was erroneous.

Persons not necessary parties defendant. Subsequent incumbrancers, etc. Agents.

Sec. 378. In *Whitney v. Higgins*, 10 Cal. 547, 552, the court say:

“But as to persons who acquire interests by conveyance or incumbrance after suit brought, it is not necessary to make them parties. They are bound by the decree. The rule is thus stated in

Story's Equity Pl. (Sec. 194:) 'But incumbrancers, who become such *pendente lite*, are not deemed necessary parties, although they are bound by the decree; for they can claim nothing except what belonged to the person under whom they assert title, since the purchase with constructive notice; and there would be no end of suits, if a mortgagor might, by new incumbrances, created *pendente lite*, require all such incumbrancers to be made parties.' "

A mere agent through whom the owner has made purchases is not a proper party. Therefore, in an action against F and I, where the complaint alleged that the materials were furnished to the former as the agent of the latter, it was held that the court below erred in overruling a demurrer for misjoinder of parties, and that the error was not cured by the subsequent finding of the court that the materials were furnished to F as a contractor, and not as a mere agent. (Hooper v. Flood, 54 Cal. 218.)

Parties. Intervenors.

Sec. 379. When a materialman institutes proceedings to enforce a lien, a prior mortgagee of the premises on which the building has been erected will, on his application, be admitted as defendant to contest the plaintiff's claim. (Walker v. Hauss-Hijo, 1 Cal. 184; see Wiltsie on Mortgage Foreclosure, sec. 187, *et seq.*)

But a mortgagor whose lien is subsequent to that of the plaintiff, (laborer and materialman,) has no absolute right of intervention, and where, therefore, suit has been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused. (Hocker v. Kelley, 14 Cal. 165.)

The right of a subcontractor to intervene was recognized in Bowen v. Aubrey, 22 Cal. 566; Davis v. Livingston, 29 Cal. 283; and in Hooper v. Flood, 54 Cal. 218; Cahoon v. Levy, 6 Cal. 296.

In VanWinkle v. Stow, 23 Cal. 458, the rule was laid down that persons having liens by mortgage upon the prop-

erty upon which the liens of the mechanics were sought to be enforced, had no right to intervene. This decision was made upon the lien act of 1862 (stat. 1862, 384) which provided a special proceeding for the enforcement of the lien to which the rules and practice pertaining to suits generally did not apply. (See *Tibbetts v. Moore*, 23 Cal. 208.)

Consolidation of several separate suits.

Sec. 380. Section 1195 of the C.C.P. *inter alia*, provides that "when separate actions are commenced the court may consolidate them."

For section 1195 in full, amendments thereto and notes thereon, see section 13, chap. 1, *supra*.

In *Curnow v. Blue Gravel etc. Co.*, 68 Cal. 262, 9 P. 149, the action was brought under section 1195 for the foreclosure of two laborers' liens separately claimed by the plaintiffs. At the calling of the case for trial, the defendant demanded, and the court refused, a separate trial of the respective claims. The defendant thereupon withdrew his answer as to one of the plaintiffs, and proceeded with the trial as to the other, and it was held that the error, if any, in refusing to allow separate trials, was waived.

After the consolidation of several actions for the foreclosure of different mechanics' liens as provided in section 1195, the actions should be treated as a single action by the respective plaintiffs against the defendants, and the decision of the court should be embodied in a single set of findings, upon which a single judgment should be entered, directing a sale of the property affected by the liens, and the application of its proceeds to the satisfaction of the amounts due the respective lienors. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629.)

If several placer mining claims are adjoining each other, and are owned by one company and worked as one mine, the liens of different persons upon different portions of the property may be joined in the same action, the counts being separately stated. (*Malone v. Big Flat etc. Co.*, 76 Cal. 578, 18 P. 772.)

Joinder of actions.

Sec. 381. A mechanic, in an action to enforce a lien for work and materials on a building, may unite a cause of action for the work and materials furnished to a contractor, with a cause of action for work and materials furnished at the request of the owner. (*Quale v. Moon*, 48 Cal. 478; settling the query raised in *Cox v. Railroad*, 47 Cal. 87.)

It is proper in an action to foreclose a lien upon a structure in favor of a laborer or materialman, to unite a personal action against the contractor with the foreclosure suit against the owner, in order to prevent a multiplicity of suits. (*Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 P. 419; *Yancy v. Morton*, 94 Cal. 558, 29 P. 1111; *Wood v. Oakland, etc. Co.*, 107 Cal. 500, 40 P. 806.)

The complaint. Formal allegations.

Sec. 382. If the plaintiff sues, or if the defendant is sued in an official or representative capacity, the proper and necessary allegations showing the capacity must be made. The general and formal allegations with reference to parties who are partners, assignees, executors, husband and wife and corporations, must also be made.

Where several mechanics' liens are united in one complaint, the cause of action upon each lien must be alleged in a separate count, but it is not necessary to number or otherwise formally designate them. (*Booth v. Pendola*, 88 Cal. 36, 25 P. 1101, s. c. 23 P. 220, 24 P. 714.)

And where the cause of action upon each lien is stated in separate counts and each count is divided into paragraphs designated by Roman numerals, the allegations of one count may, by proper reference, be made a part of another count. (*Green v. Clifford*, 94 Cal. 49, 29 P. 331.)

In an action by an assignee, it is not necessary for him to allege that the assignment of the claim on which the lien is based is in writing. An allegation that the claim was assigned is sufficient. (*Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890.)

The complaint. Averments of contract.

Sec. 383. We have shown in another place (secs. 131-140) that contract and estoppel are foundations for the right to a lien against the property of the owner. The lien-claimant who seeks to enforce a lien against the property of the owner, must, therefore, show by the allegations of his complaint either that he has furnished materials directly to, or performed labor directly for, the owner or his actual agent, or his agent under the lien law, or set forth facts which bring the owner within the rule of equitable estoppel as laid down in section 1192 of the C.C.P.

The general rules for pleading contracts are applicable here. The contract may be declared upon *hæc verba*, or in substance and according to its legal effect. (*White v. Soto*, 82 Cal. 654, 657, 23 P. 210.)

For precedent of complaint for work and materials furnished under direct contract with owner, see *Barber v. Reynolds*, 44 Cal. 519; of agency under the statute, *Renton v. Conley*, 49 Cal. 185; *Hooper v. Flood*, 54 Cal. 218; of filing and contents of claim of lien, *Barrilari v. Ferrea*, 59 Cal. 1; *Coss v. MacDonough*, 111 Cal. 662, 44 P. 325.

For rules for the use of common counts, see *Castagnino*, 82 Cal. 250, 23 P. 127; *Rebman v. San Gabriel, etc. Co.*, 95 Cal. 390, 30 P. 564; *Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487. But if price of contract is expressly agreed upon a complaint upon a *quantum meruit* would not be sufficient. There would be a variance. (*Malone v. Mining Co.*, 76 Cal. 578, 18 P. 772.)

Since the right to a lien depends upon the performance by the lien-claimant of the terms and conditions of his contract (see secs. 72, 77) it follows that such terms and conditions and facts showing their performance must be set forth in the complaint by proper averments.

Original contracts the price of which exceeds one thousand dollars are required to be in writing. (See sec. 146, *supra*.) But it is not necessary to aver that such contracts are in writing. It will be presumed, until the proof shows other-

wise, that the contract is in writing. (*McCann v. Pennie*, 100 Cal. 547, 35 P. 158; see *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890.)

When the complaint alleges that a written contract was made between the plaintiff and defendant for the erection of a building upon which the lien is claimed, and that subsequently, by their oral agreement, it was modified, and sets forth clearly and with certainty what the contract as modified was, according to its legal effect, and alleges that it was executed on the part of the plaintiff, the complaint is not demurrable for ambiguity, uncertainty and unintelligibility. (*White v. Soto*, *supra*.)

Where there has been any variation from the terms of the written contract, in the progress of the work, by consent of the parties, that fact should also be averred, and also the performance of the contract as varied. (*O'Connor v. Dingley*, 26 Cal. 11; *Sweeney v. Meyer*, 124 Cal. 512, 57 P. 479.)

A claim for extra work cannot be enforced, unless there are special allegations in the complaint as to what constitutes the extra work. A general averment of the amount or value of extra work is insufficient. (*Sweeney v. Meyer*, *supra*.)

The complaint. Averments of void contract not necessary.

Sec. 384. Where the contract with the original contractors is void there is no contract and it is, therefore, unnecessary, that the complaint of a lien-claimant should set out the original void contract and allege its invalidity, where the claimant sues for the value of the materials furnished at the special instance and request of the owner of the building. (*Yancy v. Morton*, 94 Cal. 558, 29 P. 1111.)

The complaint in the last case was upon a contract for the value of the goods sold at the special instance of the owner. But the same rule governs in a suit to foreclose the lien. (*Macomber v. Bigelow*, 58 P. 312.)

An allegation in the complaint as to the value of labor done and materials furnished to a contractor, for the erection of buildings under a void unrecorded contract, is essential to support a judgment of foreclosure of a lien therefor and it is not sufficient to allege merely what amounts the contractor agreed to pay for the labor and materials furnished for each building. (*Booth v. Pendola*, 88 Cal. 36, 25 P. 1101.)

In an action to enforce the lien of a mechanic or a materialman, the complaint must show, either that the building was constructed under a valid statutory contract, or that it was not; and a complaint upon one theory will not support a judgment rendered upon the other. (*Reed v. Norton*, 99 Cal. 617, 34 P. 333.)

Averment of agency.

Sec. 385. It would seem that an averment of the statutory agency is unnecessary. In *Parker v. Mining Co.*, 61 Cal. 348, the complaint alleged that the plaintiff, a laborer, performed labor upon the tunnel of the defendant (owner) at his special instance and request, who agreed to pay therefor, etc. The facts were that the owner, defendant, had employed Hurley to run a tunnel for him and that Hurley had employed the plaintiff to work upon the tunnel at a stipulated sum per day. The allegations of the complaint were held sufficient to sustain a judgment for plaintiff enforcing his lien against the property of the owner. (See *Renton v. Conley*, 49 Cal. 185; *Hines v. Miller*, 122 Cal. 517; 55 P. 401.)

An averment that a corporation made and entered into an agreement by its president, is sufficient as against a general demurrer. (*Malone v. Mill Co.*, 77 Cal. 38, 18 P. 858.)

But it is better pleading to omit reference to the officer of the corporation. (*Sullivan v. Milling and M. Co.*, 77 Cal. 418, 19 P. 757, or to the agent, *McIntyre v. Trautner*, 63 Cal. 429.)

The complaint. Averments of knowledge of the owner under section 1192.

Sec. 386. If the right to enforce a lien is based upon section 1192 of the C.C.P., which subjects to the lien the interest or estate of any person in the land upon which the building, etc., has been constructed, unless such person shall give notice disclaiming responsibility as provided therein—the averments of the complaint must show sufficient facts to bring such person within the provisions of that section.

A complaint, however, sufficiently avers notice to the owner of the land of the construction of the building, if it alleges that the building was constructed upon the land with the knowledge of each of the defendants, the owner of the defendants being one of the defendants. It is not necessary that the complaint should aver that the owner did not give notice that he would not be responsible for the construction of the building, such notice, if given under section 1192 of the C.C.P., being matter of defense to be set up by the owner. (*West Coast Lumber C. v. Newkirk*, 80 Cal. 275, 22 P. 231.)

But it is necessary to allege in the complaint to charge the interest of the owner in the land, that the owner had knowledge, etc., of the work. (*Jewell v. McKay*, 82 Cal. 144, 23 P. 139.)

The complaint. Notice to owner under section 1184 of the C.C.P.

Sec. 387. If the suit to enforce a lien, or other cause of action, is based upon notice to the owner given pursuant to the provisions of section 1184 of the C.C.P., appropriate allegations must be made showing the time of service and the contents of the notice, and any other facts upon which the cause of action is found and which brings it within section 1184.

A complaint alleging that materials were furnished by the plaintiff for the construction of a building, at the request of contractors named, and stating in general terms, the kind and total price of the materials, and that the plaintiff gave the owner written notice that it had agreed to furnish the materials "as aforesaid," sufficiently shows the contents of the notice to meet the requirements of section 1184. (*Russ L. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747.)

The complaint. Averments of performance of contract by lien-claimant. Prevention.

Sec. 388. It is a general rule that a person who seeks to recover upon a contract must show a substantial performance of all the terms and conditions thereof on his part to be performed. No cause of action arises upon the contract in favor of any party thereto until he has substantially performed his part of it. This rule is as applicable to the original contract, and to the contract of the laborer or materialman under the lien law, as to any other contract. Without substantial performance of his contract, the lien-claimant has no right to a lien at all. (See secs. 72, 77, *supra*.)

To state a cause of action for the enforcement of a lien it is necessary, therefore, for the plaintiff to aver in his complaint a substantial performance of all the terms and conditions of the contract on his part, or to aver those facts which, in law, excuse substantial performance and permit a recovery upon the contract, as in case of prevention by the owner of completion of the work according to the terms of the contract. (*Cox v. Railroad*, 44 Cal. 18.)

An averment in the complaint that the plaintiff was prevented by the defendant from performing the contract, is sufficient, as against a general demurrer, without stating by what means the plaintiff was prevented from performing it. (*Cox v. Railroad*, 47 Cal. 87.)

The complaint. Averments of time of completion of work. Acceptance, use or occupation by the owner, and cessation from labor. Notice by owner of completion of work.

Sec. 389. The right to an enforceable lien depends, among other things, upon the fact that the claim of lien was filed within the statutory time. (See sec. 259, 260, *supra*.)

The events from which the time to file claims of lien begin to run are expressly stated in the statute. (Sec. 1187, see sec. 260 *et seq.*) The general rule is that the statutory time begins to run from the completion of the contract or of the work. The statute, however, contemplates and provides both for an actual and a statutory completion of the work. In the latter, full use, occupation or acceptance of the building, etc., by the owner and cessation from labor for thirty days on any building, etc., the existence of any one of which facts is, by the statute, made the equivalent of actual completion for all the purposes of the lien law, and therefore, sets the statute running.

Section 1187 of the C.C.P., as it now stands, also requires the owner to file for record, notice of the completion of the building, etc., the date of the filing of which is, also, made the event from which the time to file claims of lien begins to run.

It is, therefore, necessary to aver in the complaint the date of the actual completion of the building, etc., or those other facts which, under the statute, are made the equivalent of actual completion for the purposes of the lien law, or otherwise show that the claim of lien was filed within the statutory time.

The same.

Sec. 390. An allegation in the complaint that the building or work was completed "on or about" a certain date is insufficient, where it does not otherwise appear that the claim of lien was filed within thirty days after the com-

pletion of the building or work. "On or about" is a relative term and is sufficiently definite in certain connections but in cases where the right of a person depends upon his doing a particular thing within a definite number of days after a certain event, it is necessary for him to allege that the act was done within the time required by law. (*Cohn v. Wright*, 89 Cal. 88, 26 P. 643; see *San Joaquin L. Co. v. Welton*, 115 Cal. 1, 46 P. R. 1057, s. c. 46 P. 735.)

In *San Joaquin L. Co. v. Welton*, *supra*, the complaint of a materialman alleged that the building was in an unfinished condition and that work thereon had ceased "on or about the first day of April, 1894, and has not been resumed," and that plaintiff's claim of lien was filed for record May 8th, 1894, and it was held that though the complaint was subject to demurrer for uncertainty as to the time of the cessation of the work, yet, in the absence of special demurrer, objection on that ground was waived.

And especially so where the complaint contains the further allegation that the claim of lien was filed within thirty days after the completion of the building. (*Wood v. Oakland etc. Co.*, 107 Cal. 500, 40 P. 806.)

A complaint which alleges that the defendant agreed to pay the claimant (plaintiff), "upon the completion of the building," and also that at the time of the commencement of the suit the building was not completed, fails to state a cause of action. (*Harmon v. Ashmead*, 60 Cal. 439.)

In *Giant Powder Co. v. Flume Co.*, 78 Cal. 193, 20 P. 419, it was alleged in the complaint of a materialman that one J contracted with the defendant, owner, to do certain work; that plaintiff furnished materials to the defendant to be used in the work; that J commenced work under the contract on a certain day and continued doing such work until a certain day; that on or about the last named day J stopped all work and surrendered the contract and his right thereunder to the defendant, owner, and that the owner accepted the surrender of the contract and accepted the structure and works for which the lien was claimed, and

took possession thereof, and ever since continued in the occupation and use of the structure and works so accepted. It was held that the above allegations were sufficient as averments of use, occupation and acceptance of the work under section 1187 of the C.C.P.

The complaint. Averments of labor and materials.

Sec. 391. The statute gives a lien in those cases only which come within its provisions. If the lien-claimant belongs to a special class of persons enumerated in the statute to whom it gives liens, proper allegations must be made in the complaint to bring him within the statute.

But an allegation in the complaint that the plaintiff was a "contractor" when in fact he was a materialman, may be disregarded as surplusage when the complaint avers specifically the facts showing his status and with whom he contracted. (*Hinckley v. Biscuit Co.*, 91 Cal. 136, 27 P. 594.)

Again, the statute gives liens for materials furnished for the construction, alteration, addition to, or repair of the building, structure or other improvement enumerated in it. (Sec. 89, *supra*.) The right of a materialman to a lien depends, therefore, upon the fact that he has furnished materials for one of the buildings, structures or other improvements mentioned in the statute, and also upon the fact that such materials were furnished for the construction, alteration, addition to, or repair thereof.

The labor for which a lien may be claimed is not limited to the construction, alteration, addition to, or repair of any building, etc. The statute gives a lien for the performance of labor whatever may be the particular character of it, or whatever may be the particular condition of the building, etc., upon which it is performed, and notwithstanding it is not done upon the construction, alteration, addition to, or repair thereof. (Sec. 88, *supra*.)

Whatever the facts of the particular case may be, it is necessary to allege in the complaint sufficient to show that the particular labor or materials for which the lien is claimed, is lienable under the statute.

The complaint. Averments that materials were furnished for and used in building, etc.

Sec. 392. The allegations of the complaint must show that the materials for which a lien is claimed were used, and by the express terms of the contract, were furnished to be used in the particular building on which the lien is claimed. (*Houghton v. Blake*, 5 Cal. 240; *Holmes v. Richet*, 56 Cal. 307; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890; *Silvester v. Mining Co.*, 80 Cal. 510, 22 P. 217; *Lumber Co. v. Neal*, 90 Cal. 213, 27 P. 192; *Roebeling Sons Co. v. Bear Valley I. Co.*, 99 Cal. 488, 34 P. 80; see sec. 91a, *supra*.)

And it is not sufficient to allege that they were used in such building. (*Bottomly v. Grace Church*, 2 Cal. 90.)

An allegation that the materials were furnished upon the terms and conditions set forth in the claim of lien attached to the complaint as an exhibit, is insufficient as against a demurrer for uncertainty. It is not sufficient to allege that the materials were furnished by the plaintiff and actually used in the construction of the building. (*Cohn v. Wright*, 89 Cal. 86, 26 P. 643.)

But an allegation in the complaint that the claimants sold and delivered to the owner of the building "certain hardware and building material to be used in the erection and construction of said building, and affixed and attached thereto," is, in the absence of a special demurrer, a sufficient allegation that the materials were used in the building, to support a finding to that effect. (*Reed v. Norton*, 90 Cal. 590, 27 P. 426, s. c. 26 P. 767.)

Where the complaint alleges only that materials were furnished to the contractor, the court cannot enforce a lien against the owner upon proof that materials were bought by the owner directly from the plaintiff and were used in the construction of the building, nor adjudge the recovery of a lien for the amount of the materials thus bought. (*Gibson v. Wheeler*, 110 Cal. 243, 42 P. 810.)

The complaint. Averments of time of furnishing materials or of performing labor.

Sec. 393. When, under section 1186 of the C.C.P., the plaintiff claims a priority of his lien over any other lien upon the same property, it may become necessary for him to allege the time when the work on the building, etc., was commenced, or the time when the particular work of the plaintiff was commenced or when his materials were commenced to be furnished, (see *Harmon v. Ashmead*, 68 Cal. 321, 9 P. 183) and also that he had no notice of such liens. (See *Root v. Bryant*, 57 Cal. 48.)

The reasonable construction of an allegation in a complaint that "plaintiff furnished the materials between the 6th day of April, 1862, and the 28th day of June, 1862," is that plaintiff commenced furnishing the materials on the former date and continued furnishing them, from time to time, up to the latter. (*McCrea v. Craig*, 23 Cal. 522.)

The complaint. Averments of money due and unpaid.

Sec. 394. The right to an enforceable lien also depends upon the fact that there is something due for the work from the owner to the original contractor where the claimant bases his right to such lien upon his contract with the original contractor to whom, under such contract, he has furnished labor or materials for the building constructed for the owner; and, also, upon the additional fact that, according to the terms of the contract between the claimant and the original contractor, there is something due the claimant upon that contract for his labor or materials. (See *Harmon v. Ashmead*, 60 Cal. 439.)

Again, where the right to such lien is based upon a direct contract between the owner and the claimant, the complaint must show that, according to the terms of such contract, there is something due thereon from the owner to the claimant.

A complaint which fails to aver that any part of the contract price for the building upon which the lien is claimed remained unpaid from the owner to the contractor at the time of the recording of the lien (under the act of 1868, 589) is demurrable. (*Renton v. Conley*, 49 Cal. 185.)

A complaint which contains no allegation that the owner was indebted to the contractor on the contract for the work at the time the plaintiff's lien attached to the property or to the contract price in the hands of the owner, is fatally defective. (See *Wells v. Cahn*, 51 Cal. 423; *Dingley v. Green*, 54 Cal. 333; *Whittier v. Holister*, 64 Cal. 283, 30 P. 846; *O'Donnel v. Kramer*, 65 Cal. 352, 4 P. 204; *Doggett v. Bellows*, 6 P. 421; *Latson v. Nelson*, 11 Pac. C. L. J. 589.)

If the right to a lien arises from the abandonment of the contract within the meaning of section 1200 of the C.C.P., the averments of the complaint must show that the lien-claimant is entitled to some part of the contract price according to the rule laid down by that section. (See sec. 307 *et seq.*, *supra.*)

The same.

Sec. 395. The allegation must be, in effect, that there was a balance due on the contract, from the owner to the contractor, at the time the claim of lien was filed; or that the owner was notified or had knowledge of the claim of plaintiff prior to the payment in full of the amount due the original contractor under the contract. (*Rosenkranz v. Wagner*, 62 Cal. 151; *Green v. Clifford*, 94 Cal. 49, 29 P. 331.)

A complaint of a materialman which fails to allege that anything was due from the owner to the original contractor when the lien was filed, is insufficient, notwithstanding it alleges that during the construction of the building the owner compelled the contractor to abandon the work, took possession of the building, completed it, used the materials the contractor had furnished in its completion, and withholds from the contractor a large portion of the contract price. (*Turner v. Strenzel*, 70 Cal. 28, 11 P. 389.)

If the complaint, however, had alleged that the owner of the building had the building completed for a less sum than what remained of the contract price after the contractor abandoned the work, and that a balance of the price was in the hands of the owner at the time of filing the lien, it would have been sufficient. (*Wiggins v. Bridge*, 70 Cal. 437, 11 P. 754.)

When the original contract is void, it is necessary to support a judgment, that there be proper allegation in the complaint as to the value of the labor done and materials furnished to the contractor. (*Booth v. Pendola*, 88 Cal. 36, 25 P. 1101, s. c. 23 P. 200, 24 P. 714.) But an allegation of an agreed price for the materials is sufficient as an allegation of value, in the absence of a special demurrer. (*Brigham v. Knox*, 59 P. 198.)

An allegation that defendant for whom the plaintiff performed the services for which the lien was filed, has paid to plaintiff no part of the amount due therefor, and that the same is now due and owing to the plaintiff from the defendant, is a sufficient averment of non-payment, in the absence of a demurrer. (*Palmer v. Uncas M. Co.*, 70 Cal. 614, 11 P. 686.)

The complaint. Averment of jurisdiction of court. Area of land.

Sec. 396. Suits brought for the foreclosure of all liens upon real property must be tried in the county in which the property, or some part thereof, is situated. (Sec. 392, C.C.P.)

Suits for the foreclosure of mechanics' liens fall within this section (see sec. 365, *supra*), and must, therefore, be tried in the county in which the property or some part thereof, is situated.

Under this section, therefore, in order to give the court jurisdiction of an action to foreclose a mechanic's lien, it is necessary for the plaintiff to allege in his complaint that

the property or some part thereof, is situated in the county in which the suit is brought. In the absence of such allegation the plaintiff is not entitled to prove such fact, nor can a finding or recital in the decree that the land is situated in such county be supported, in the absence of the necessary averment. (*Campbell v. West*, 86 Cal. 197, 24 P. 1000.) By section 1185 of the C.C.P. the land upon which the building or structure is constructed is made subject to the lien of the laborer and other lien-claimants, and this, it would seem without allegation, proof or finding. (*Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932; sec. 1185 C.C.P.; *Sachse v. Auburn*, 95 Cal. 650, 30 P. 800;) but in order to subject more land than that actually covered by the building or structure, it is necessary to make allegations setting forth the amount of land necessary for the "convenient use and occupation" of the building or other structure. This is an issuable fact. (*Willamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633, s. c. 24 P. 1026.)

In *Green v. Chandler*, 54 Cal. 626, the trial court found that the whole of the defendant's land was required for the convenient use and occupation of the structure. There was no allegation in the complaint upon the point and it was held that the finding was outside of the issues, and, therefore, could not sustain the judgment.

A complaint which follows the language of the notice of lien and describes the land in the language of the statute as follows: "with such convenient space of land around the same [building] as may be required for the convenient use and occupation thereof," is sufficient. (*Tibbitts v. Moore*, 23 Cal. 208, 213.)

The complaint. Averments describing property and of ownership thereof.

Sec. 397. The object of the suit being to subject the property to the lien of the plaintiff, it follows that the property should be described with sufficient accuracy to enable

the court to decree a sale of it and the purchaser to locate it under such description. (*Lumber Co. v. Kremer*, 94 Cal. 205, 210, 29 P. 633, s. c. 24 P. 1026.)

The statute (sec. 1187; see secs. 239-242, *supra*.) requires the claim of lien to contain a "description of the property to be charged with the lien sufficient for identification." The claim of lien being the foundation for the right in the suit to charge the property with the lien, whatever is a sufficient description of the property in the claim, is sufficient as a description of the property in the complaint. (See secs. 239-242, *supra*.)

As a rule the description of the property in the complaint should follow that in the claim of lien. A slight variance, however, is not material. (*Brunner v. Marks*, 98 Cal. 374, 33 P. 265.)

The property described must be that upon which the buildings are situated and for which the labor and materials were furnished, and, in any case, the lien cannot be enforced against land not within the description of the property in the complaint.

The property accurately and sufficiently described in the complaint must be that owned by the person who, under the statute, authorized, or permitted the construction, etc., of the building, etc., upon such property, or his successor in interest at the time of filing suit. (See *Corbett v. Chambers*, 109 Cal. 178, 41 P. 873.)

Both of these facts must concur in order to give the right to subject the property to liens; for the property of any person cannot be subjected to liens except he is brought within the provisions of the lien law. (See sec. 130 *et seq.*)

The plaintiff, therefore, must set forth in his complaint the necessary allegations to show that the contracting-owner was the owner of the property, or of some estate therein, against which the lien is sought to be enforced, at the time of the commencement of the work or of the furnishing of materials for the same. (Sec. 1185, C.C.P.; see *Gaskill v. Moore*, 4 Cal. 233; *Dusy v. Prudom*, 95 Cal. 646, 30 P. 798.)

An allegation in the complaint, that in his claim of lien filed, the plaintiff described the premises as those purchased and occupied by M is not a sufficient averment of the ownership of M, because it is not an averment of the complaint, but an averment that the plaintiff has stated in his claim of lien that M owned the property, and does not aver who the owner of the premises was at the time of the commencement of the action. (*Hicks v. Murray*, 43 Cal. 515.)

The complaint. Averments of time and place of filing claim of lien.

Sec. 398. The statute requires the claim of lien to be filed for record in the office of the county recorder of the county, or city and county, in which the property, or some part thereof, is situated (sec. 1187, C.C.P.; see sec. 258, *supra*), and also requires that the claim of lien shall be filed within thirty or sixty days, as the particular case may require, after certain events therein named.

A compliance with the requirements of the statute in these respects is essential to the validity of the claim, and the complaint, must, therefore, contain proper allegations showing that the claim was filed in the proper recorder's office and within the proper time. (See as to time of filing claim, *Slight v. Patton*, 96 Cal. 384, 387, 31 P. 248; *Cohn v. Wright*, 89 Cal. 88, 26 P. 643; *San Joaquin L. Co. v. Welton*, 115 Cal. 1, 46 P. 1057, s. c. 46 P. 735; *Wood v. Oakland etc. Co.*, 107 Cal. 500, 40 P. 806; as to time and place of filing claim, *Barilari v. Ferrea*, 59 Cal. 1.)

The complaint. Averments of contents of claim of lien and of notice.

Sec. 399. The complaint must set forth the contents of the claim of lien. This may be done, however, either by alleging the contents of the claim, or by annexing a copy of the claim to the complaint and making it a part thereof by proper reference. (*Russ L. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747; *Cohn v. Wright*, 89 Cal. 86, 26 P. 643.)

A complaint alleging that materials were furnished by the plaintiff for the construction of a building at the request of the contractors named, and stating in general terms the kind and total price of the materials, and that the plaintiff had given the owner written notice that it had agreed to furnish the materials "as aforesaid," sufficiently shows the contents of the notice to meet the requirements of section 1184 of the C.C.P. (*Russ. L. Co. v. Garrettson, supra.*)

A complaint, upon foreclosure of a subcontractor's lien, which described the notice of lien as stating that the claimant entered into a contract with the original contractors, under and by which he was to do all painting, etc., and to furnish all necessary materials, as specified in the plans and specifications of the building, is not fatally defective as against a general demurrer to the complaint, because the notice does not set forth the plans and specifications of the original contract in regard to the painting. (*Slight v. Patton*, 96 Cal. 384, 31 P. 248; see *Barilari v. Ferreira*, 59 Cal. 1, as to averments of contents of claim of lien.)

If there is a mistake in the name of the employer in the claim of lien, the proper averments must be made in the complaint foreclosing the lien, to show the identity of the defendant and the employer. (*Jewell v. McKay*, 82 Cal. 144, 23 P. 139.)

The complaint. Attorney's fees, costs of filing and recording claim.

Sec. 400. Section 1195 of the C.C.P. provides that the court must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorney's fee in the Superior and Supreme Courts, such costs and attorney's fee to be allowed to each lien-claimant whose lien is established, whether he be plaintiff or defendant, or whether the lien-claimants all join in one action, or separate actions are consolidated.

(For notes and amendments to this section see sec. 13, *supra.*)

It is not necessary in a complaint to foreclose a lien to aver what was paid by plaintiff for filing and recording the claim of lien, or what sum would be a reasonable attorney's fee in the Superior and Supreme Courts; but the right to recover these, like the ordinary right to recover costs, is a necessary incident to the judgment establishing the plaintiff's lien, and does not depend upon any averments in the complaint, except such as are necessary to establish the lien. (*Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144; *Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758.)

No allegation need be inserted in the complaint relative to the claim of the plaintiff for attorney's fee; and an allegation on that subject, if made, does not bind the party making it, and an issue made by the pleadings on that question is immaterial and the court need not find upon it. The attorney's fee is to be fixed by the court irrespective of any averment in the complaint. (*Clancy v. Plover*, 107 Cal. 272, 40 P. 394; see sec. 452 *et seq.*, *infra*.)

The plaintiff is not entitled to recover anything for an attorney's fee paid for preparing his claim of lien, and an averment as to the amount so paid should be stricken out of the complaint. (*Mulcahy v. Buckley*, *supra*.)

Demurrer.

Sec. 401. An averment in a complaint that the plaintiff was prevented by the defendant from performing a contract is sufficient as against a general demurrer without stating by what means the plaintiff was prevented from performing it. (*Cox v. Railroad*, 47 Cal. 87.)

A complaint which states a good cause of action for the recovery of money, is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action, because there is also an ineffectual effort to state, in the complaint, a cause of action for the foreclosure of a mechanic's lien to secure the same money. (*Cox v. Rail-*

road, *supra*.) The remedy in such case would be by special demurrer for misjoinder of causes of action, [*Id.*] and if demurrer is not interposed, or the question of misjoinder raised by answer, it is waived. (*Macondray v. Simmons*. 1 Cal. 393.)

An objection to the complaint, in an action to foreclose a lien for materials furnished a contractor, on the ground that it states merely conclusions of law as to the amount due and owing from the owner to the contractor, and that it contains no specific averment as to what was the contract price between them, or that there was any express agreement to pay anything, or what was the reasonable value of the work to be done, can only be raised by demurrer, and cannot be urged for the first time on appeal. (*Russ Lumber etc. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747.)

The complaint is demurrable for ambiguity and uncertainty if its allegations are inconsistent with an exhibit thereto attached. (*Palmer v. Lavigne*, 104 Cal. 30, 37 P. 775; *Frazer v. Barlow*, 63 Cal. 71; *Malone v. Big Flat etc. Co.*, 76 Cal. 578, 18 P. 772.)

Uncertainty in the averments of the complaint as to the time of cessation of the work, can be reached only by special demurrer, otherwise it is waived. (*San Joaquin L. Co. v. Welton*, 115 Cal. 1, 46 P. 1057, s. c. 46 P. 735.)

The objection that the complaint does not state that the materials were furnished to be used in the construction of the building on which the lien is claimed, should be taken by demurrer and not by objection to the evidence which shows that the materials were thus furnished and used. (*Tibbetts v. Moore*, 23 Cal. 208.)

**The answer. Defenses must be pleaded.
Sufficient averments of.**

Sec. 402. In an action against the owner of a building to enforce a lien thereon, brought by a party who has furnished materials to the contractor for the construction of the building, the defendant, in order to avail himself of

a breach of the contract by the contractor, must make it a part of his defense by proper averments in his answer. (*Blethen v. Blake*, 44 Cal. 117.)

In such case, if the owner relies for a defense on the fact that the building was not finished by the contractor according to the contract, he must plead the same specially in his answer. (*McGuire v. Quintana*, 52 Cal. 427.)

The same rule applies to the defense by the owner of the abandonment of the contract by the contractor before the completion of the work; (*Quale v. Moon*, 48 Cal. 478,) and also where the work was badly done; (*Kelley v. Plover*, 103 Cal. 35, 36 P. 1020;) and of another action pending, (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487,) and also where he relies for a defense that he had no knowledge, etc., under section 1192 of the C.C.P. (*Lumber Co. v. Newkirk*, 80 Cal. 277, 22 P. 231.)

Averments in the answer that the contract between the owner of the building and the contractor was verbal; that the price to be paid and that was paid thereunder was less than one thousand dollars; that it was to be and was paid every Saturday night as the work progressed; that the last installment was paid upon the completion of the work; and that the only notice that the owner received from the plaintiff was about one month after he had paid the contractor in full—are sufficient to constitute a defense on the part of the owner of the building against the claim of lien on the part of the materialman. (*Lumber Co. v. Cummings*, 86 Cal. 22, 24 P. 814.)

If the owner, in an action by a subcontractor, relies on the fact, as a defense, that sums he has paid the contractor before he abandoned the work and the cost of completing the building, amount to more than the contract price, he must make the proper averments in his answer setting up such defense. (*Quale v. Moon*, *supra*.)

**The answer. Sufficient and insufficient denials.
Conclusions of law.**

Sec. 403. In an action to foreclose a lien for seventy-six dollars, where the answer averred that the value of the labor "was not over the sum of fifteen dollars or twenty dollars," it was held that there was a denial that the value of the labor was seventy-six dollars and that the answer should not be stricken out. (*Way v. Oglesby*, 45 Cal. 655.)

If the complaint, in an action to enforce a lien on a mining claim for work and labor, avers that the plaintiff performed labor on the mine at the request of the defendant, an answer denying that the labor was performed at the request of the defendant is not a denial that the work was performed on the mine. (*Bradbury v. Cronise*, 46 Cal. 287.)

So where the complaint alleges that the defendant has, or claims an interest in the land which is subsequent to the lien of plaintiff, this allegation is wholly immaterial, and a general denial does not amount to a disclaimer of such interest, but only puts in issue the fact that such interest is subject to the lien. (*Elder v. Spinks*, 53 Cal. 293.)

Again, where the complaint alleged the date of the completion of the building, and that the lien was filed on April 6, 1894, within thirty days thereafter, and the answer denied "that within thirty days from and after the completion of said building to wit, upon the 6th day of April, 1894, or at any other time, or at all," plaintiffs filed their claim of lien, the answer was but a denial of the time of filing the notice of lien and admitted the allegation of the time when the building was completed. (*Lingard v. Beta etc: Ass'n*, 56 P. 58.)

A denial in the answer that plaintiff has a lien on the mine is only a conclusion of law, and not a denial of a fact. (*Bradbury v. Cronise*, *supra*.)

And so is a denial that the plaintiff has complied with the requirements of the provisions of the C.C.P. relating to

mechanic's liens, or that he is entitled to any lien on any property of the defendant. (*Curnow v. Blue Gravel etc. Co.*, 68 Cal. 262, 9 P. 149. For qualified and copulative denials relating to the contract alleged in the complaint to enforce a lien which were held insufficient, see *Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144.

The answer. Denials on information and belief.

Sec. 404. Where the complaint alleges in due form that plaintiff filed and recorded his claim of lien in the recorder's office and sets out the claim of lien in full in the complaint, an answer denying the allegations thus made for want of information and belief upon the subject sufficient to enable the defendant to answer the allegations made, and placing the denial upon that ground, does not put such allegations in issue, and should be disregarded. (*Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144.)

An answer which admits the ownership by the defendant of the property against which the lien is claimed, and the employment of the plaintiff to perform labor thereon, and for answer to an allegation of the complaint "that the plaintiff performed work and labor on the property as a miner," avers that "defendant is not sufficiently informed to admit that the plaintiff performed work and labor as a miner upon the property of the defendant and, therefore, defendant denies said allegation," is evasive and raises no issue as to the identity of the property upon which the work was done. (*Curnow v. Blue Gravel etc. Co.*, 68 Cal. 262, 9 P. 149.)

A defendant is not permitted to answer any allegation for want of information or belief upon the subject sufficient to enable him to answer, when he may be presumed to know, or when he is aware before answering, that he has the means of ascertaining whether or not such allegation is true; and such answer is improper, where it appears that the defendant knew, before answering, that he could cer-

tainly ascertain whether or not plaintiff had recorded his claim of lien, as alleged in the complaint, by examining the public record in the county in which the lots upon which the lien was claimed was situated. (*Mulcahy v. Buckley, supra.*)

But this rule does not apply to the denial of the sufficiency of a recorded claim of lien when the claim is pleaded substantially in the language of the statute, is inartificially drawn, and a copy of the claim is not set out in the complaint. (*Hagaman v. Williams*, 88 Cal. 146, 25 P. 1111.)

The answer. Admissions.

Sec. 405. An admission of ownership, in the separate answer of certain defendants in an action to foreclose a mechanic's lien, must be taken as true upon appeal, notwithstanding a finding that other defendants were owners, made upon issues joined as to their ownership. (*Goss v. Helbing*, 77 Cal. 190, 19 P. 277.)

And so of a finding of knowledge by the owner of construction of building. (*Lumber Co. v. Apfield*, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231.)

A defendant on the trial cannot controvert a fact admitted by the pleadings. (*Bradbury v. Cronise*, 46 Cal. 287; *Bruner v. Marks*, 98 Cal. 374, 33 P. 265; *San Francisco L. Co. v. O'Niel*, 120 Cal. 455, 52 P. 728; *McGinty v. Morgan*, 122 Cal. 103, 54 P. 392; *Schmid v. Bush*, 97 Cal. 184, 31 P. 893.)

Defenses of owner. Generally.

Sec. 406. By the provisions of section 1187 of the C.C.P., (sec. 5, *supra*.) if the owner neglects to file for record notice of completion of the building, etc., as therein required, he is denied the right of maintaining a defense to the suit of the lien-claimant to enforce his lien, based on the ground that such claim of lien was not filed within the time provided by the lien law. (See sec. 282 *supra*.)

And by the provisions of section 1184 of the C.C.P., (sec. 2, *supra*,) the owner cannot maintain a defense to the suit of any lien-claimant, except that of the contractor, based upon the ground that he has made payment of the price in advance of the commencement of the work, or upon any other payment which has been made in contravention of the terms of the statute or of the terms of the contract.

Nor, by the same section, can he set up as a defense against any lien-claimant, except the contractor, that the contractor is indebted to him, either prior or subsequent to the making of the contract, or set up any other setoff or counter-claim of his against the contractor.

Defenses of owner. Continued.

Sec. 407. In an action by the original contractor for the reasonable value of the work and materials furnished, it is no defense to such action that the implied contract was not in writing and not filed for record in accordance with the requirements of the statute. (*Rebman v. San Gabriel etc. Co.*, 95 Cal. 390, 30 P. 564.)

The owner of the building is estopped from setting up the illegality of the formation of a partnership by two corporations which furnished materials for the building, in an action to foreclose a lien therefor, by an assignee of the partnership. (*Yancy v. Morton*, 94 Cal. 558, 29 P. 1111.)

Offset and counterclaim in favor of owner against contractor. The statute and decisions.

Sec. 408. Section 1184 of the C.C.P., *inter alia*, provides that the whole contract price :

“Shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim, in favor of the reputed owner and against the contractor.” (See sec. 2 for this section in full, amendments thereto and notes thereon.)

The object of this statutory provision is to preserve the whole contract price in the hands of the owner and to make it a fund out of which the claims of lienors may be paid. The effect of this provision is to give to lien-claimants (other than the contractor), a priority in the payment of their demands for labor and material over any indebtedness, offset or counterclaim of the owner against the contractor. It is not intended by this provision of the statute to deny to the owner the right to offset or counterclaim any indebtedness of his against the contractor where there are no lien-claimants, or even where there are lien-claimants, if they have not taken the steps given by other provisions of the statute, to reach the price in the hands of the owner prior to the time when the owner has a right to pay the price to the contractor in accordance with the terms of the contract. (*Harlan v. Stufflebeem*, 87 Cal. 508, 25 P. 686; *Meigs v. Bruntsch*, 54 Cal. 601.)

And, it is believed, this provision of the statute does not prevent the owner (in the absence of the statutory notice or a filed claim of lien) from receiving a credit for an existing indebtedness from the contractor to himself, upon making, in accordance with the terms of the contract, any of the payments therein provided for. No right of lien-claimants intervening, the owner is at liberty to make payments of the price in any medium, or by such credits, as shall be agreed upon between the contractor and himself, and in such case, the owner has the same rights as any other party to a contract and the general law of contracts as well as of setoff and counterclaim apply.

Recoupment of damages for non-performance.

Sec. 409. In *Meigs v. Bruntsch*, 54 Cal. 601, the contract price for the erection of a building was \$1515; \$1000 of the price was paid as the work progressed, and the last payment of \$515 was not made because the owner claimed the building was not completed in accordance with the

terms of the contract, and the court below so found. A materialman brought suit to enforce his lien for materials against the property of the owner, and it was held that the materialman was not entitled to enforce his lien for any part of the last payment.

The owner cannot recoup damages for the contractor's failure to complete the building within the time stipulated in the contract where such failure was due solely to the owner's negligence. (*White v. Fresno Nat. Bank*, 98 Cal. 166, 32 P. 979.)

Nor for rents lost where the circumstances show that the time for the completion of the building was modified. (*McGinley v. Hardy*, 18 Cal. 115.)

Nor for damages for non-completion of the building upon the date stipulated in the contract where the contract is void because not filed for record. (*Rebman v. San Gabriel etc. Co.*, 95 Cal. 390, 30 P. 564.)

Nor, as against an assignee, can he counterclaim for the expenses incurred by him for the repairs of the building as stipulated in the contract, when such expenses were incurred subsequent to the assignment. (*First Nat. Bank v. Perris I. Dist.*, 107 Cal. 55, 40 P. 45.)

But the mere novation of the original contract by assignment to another would not effect the right of setoff or counterclaim as against the original contractor. [*Id.*]

A stipulation in the contract fixing a specified amount per day as liquidated damages for delay in not completing the building within the contract time, in the absence of other evidence showing the impracticability or extreme difficulty of fixing the actual damages caused by the delay, is not sufficient to entitle the owner to recover the stipulated amount upon the failure of the contractor to complete the building within such time. (*Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890.)

If the contractor has substantially performed his contract he will not lose his right of action to recover thereon, but

the owner will be entitled to recoup damages for slight omissions and imperfections. (*Harlan v. Stufflebeem*, 87 Cal. 508, 25 P. 686.)

In an action by a contractor to recover a balance alleged to be due on the contract, the owner is entitled to set off an amount expended by him in finishing the house, after the refusal of the contractor to complete it upon being notified to do so, authority to finish the house upon the happening of such event being given to the owner by the contract. (*Scammon v. Denio*, 72 Cal. 393, 14 P. 98.)

Where the owner makes premature payments of the contract price, he will not be entitled, as to such payments, to recoup damages for the non-performance of the contract by the contractor or otherwise, where there are lien-claimants other than the original contractor. (See sec. 1184 and sec. 187 *et seq.*, *supra*.)

Offset and counterclaim. Judgment, costs and attorneys' fee. The statute.

Sec. 410. Section 1193 of the C.C.P. reads as follows:

"The contractor shall be entitled to recover upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where a lien shall be filed, under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed; and in case of judgment against the owner, or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor the amount of such judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to

the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

This section was enacted in 1873 (amendt's 1873-4, 109), and has not since been amended. See section 8, *supra*.

Offset and counterclaim. Judgments.

Sec. 411. If the materialman obtains judgment against the property, the owner may deduct the amount of the judgment from any sum due the contractor on the contract price. (*Whittier v. Wilbur*, 48 Cal. 175; *Clancy v. Plover*, 107 Cal. 272, 40 P. 394.)

The owner of a building who is sued by a contractor who erected the building under an unrecorded contract, for the reasonable value of the work and labor performed and materials furnished, may setoff the amount paid by him upon foreclosure of liens of materialmen for materials furnished to the contractor. (*Covell v. Washburn*, 91 Cal. 560, 27 P. 859.)

In an action of *indebitatus assumpsit* to recover for work done and materials furnished where the answer in such action does not plead another action pending, which had been first brought by the subcontractor of the plaintiff (original contractor) against the agent of the defendant (owner) to recover for a foundation built pursuant to the contract, the judgment and costs in such former action, in favor of the subcontractor and against the agent of the defendant, can not be deducted from the balance unpaid on the contract between the plaintiff and the defendant, nor can it be offset so as to reduce the amount of plaintiff's recovery. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487.)

Offset and counterclaim. Costs and attorney's fee. Interest.

Sec. 412. The owner of a building who is sued by a contractor for the reasonable value of the work done and materials furnished, may setoff the amount paid by him upon foreclosure of liens of materialmen for materials furnished the contractor including the amount allowed and paid for attorney's fee and costs as well as for principal and interest of liens. (*Covell v. Washburn*, 91 Cal. 560, 27 P. 859; *Clancy v. Plover*, 107 Cal. 272, 40 P. 394.)

The costs, however, which the statute permits to be setoff as against the contractor are those allowed in suits by lien-claimants against the owner. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487.)

In an action by an assignee of building contractors for the reasonable value of services performed and materials furnished by them under a void contract, where it was pleaded in the answer and admitted at the trial that actions were pending for the foreclosure of liens in favor of subcontractors, it is the duty of the court to continue the trial of the case until the actions in favor of the subcontractors should be tried and determined, in order to secure to the defendant (owner) the right of setoff of the amount of costs and attorneys' fee in such actions against the claim of the contractor, it being his duty to have paid his debts to the subcontractors, or to have defended the suits brought by them at his own expense. (*Macomber v. Bigelow*, 123 Cal. 532, 56 P. 449.) But the owner in such case may defend the suits of lien-claimants for the foreclosure of their liens at the expense of the contractor. (*Clancy v. Plover*, *supra*; sec. 414, *infra*.)

The same. Owner not entitled to setoff costs and attorney's fee.

Sec. 413. In an action against the owner of a building and the contractor to foreclose mechanics' liens, the action of the contractor in permitting his default to be entered, is, in effect, an admission that the plaintiffs are entitled to the money, and where the owner of the building retains the balance of twenty-five per cent. of the price due the contractor in his hands, and apparently without cause or right raises a contest on every point and fights the case to the end, his liability is not limited to the amount due the contractor, but costs and counsel fees are properly allowed and made payable out of the proceeds of the property ordered to be sold to satisfy the liens. (*DeCamp L. Co. v. Tolhurst*, 99 Cal. 631, 34 P. 438.)

In the last case, at page 635 Cal., the court say:

"After the completion of the contract the owner holds the reserved money for payment to the contractor or lien-claimant as the one or the other may prove to be entitled to it. If there be a contest between them in regard to the money, it is a matter for them to settle between themselves and at their own expense, and with which the owner has no concern. In such a case the owner may and should deposit the money in court and let the contestants then have their rights determined."

(*Wilson v. Nugent*, 125 Cal. 280, 57 P. 1008.)

Where the contractor has given orders to the owner of the building in favor of materialmen, who afterward filed liens upon his property, and the owner, at the date of the orders, was indebted to the contractor in excess of that amount, the liens should be offset in a suit by the contractor against the owner only for the amount due at the date of the orders, and not the costs and expenses of the liens. In such case the owner should not be permitted to recover from the contractor the costs and expenses incurred by reason of his refusal. (*Adams v. Burbank*, 103 Cal. 646, 37 P. 640.)

But this rule applies to this case only when the owner has promised to pay the contractor's orders and not to a case where there is no such promise and where the contractor gave an order for a part only of the amount due him from the owner. The contractor cannot split his demand. (*Clancy v. Plover*, 107 Cal. 272, 40 P. 394.)

Offset and counterclaim. Claims and demands of lien-claimant.

Sec.414. The owner is not personally liable for the debts of the contractor to lien-holders for materials furnished to, or for labor performed for, the contractor (sec. 364, *supra*,) and where such debts exist, the owner cannot be presumed to know whether or not the contractor has any valid defenses to their suits to foreclose their liens based upon those debts. Therefore, where the owner pays the demands of lien-claimants for which they have filed liens against his property, without suit brought by them and without request of the contractor, he does so at the peril of being adjudged to have paid them as a mere volunteer, to the extent to which the demands paid may not be proved to be valid liens upon the owner's property, and to this extent he would have no recourse upon the contractor for indemnity. And besides, where the owner under such circumstances pays such demands, he has in addition imposed upon him the burden of proving that the demands were valid debts of the contractor, or that he paid them upon the request of the contractor.

The owner is never under obligation to the *contractor* to pay his debts to the lien-claimants. His only obligation to the contractor, where the contract is void because not filed for record, is to pay to him so much as the labor he has performed and the materials he has furnished and used in the construction of the building, are reasonably worth. Against this obligation the owner is entitled to set off the contractor's obligation to indemnify him for all that he has

been compelled to pay to relieve his property from the liens thereon to secure the contractor's debts, including costs of suit to enforce those liens and attorney's fees. (*Covell v. Washburn*, 91 Cal. 560, 27 P. 859; *Clancy v. Plover*, 107 Cal. 272, 40 P. 394.)

Where the owner who has retained twenty-five per cent. of the contract price, after he has knowledge of the appointment of an assignee for the benefit of the contractor's creditors and a demand made by him for the money retained, without any order of court or any judgment as to the validity of the alleged liens, pays them, he pays them at his own risk, and, if they are not valid liens, he will be liable to the assignee for the amount paid. (*Wilson v. Nugent*, 125 Cal. 280, 57 P. 1008.)

So, where the owner, out of the contract price, pays laborers who were entitled to file claims of lien and would have filed them but for such payment, and has retained twenty-five per cent. of the contract price as required by section 1184 of the C.C.P., he is entitled to credit for such payment, and materialmen are not entitled to have the amount of such payment considered as part of the fund available for their claims, on the ground that there could be no privity between the owner and such laborers until they had filed their liens, so as to entitle the owner, to pay them. (*Dunlop v. Kennedy*, 34 P. 92; *Lott v. Corwin*, Superior Court, Los Angeles Co., Judge Shaw, 1896.)

Supplemental answer.

Sec. 415. A mortgagee made defendant to a suit to foreclose mechanics' liens, who alleges priority of lien, and pleads that he has commenced an action to foreclose the mortgage, making the plaintiffs parties defendant, may, if he obtains a decree of foreclosure of his mortgage *pendente lite*, set up such decree by way of supplemental answer upon a re-trial of the mechanics' lien suit, and the question as to its effect may be then tried and determined. (*Bewick v. Muir*, 83 Cal. 373, 23 P. 390.)

Cross-complaint.

Sec. 416. If an answer states facts necessary to constitute a cause of action for a cross-complaint, it is immaterial whether the defendant designates it as an answer or a cross-complaint. It is the facts set up in the pleading which makes it the one or the other, and its character will be determined by the court. Accordingly, in an action for the foreclosure of a mechanic's lien against the owner and the original contractor—where the answer of the latter sufficiently sets up a claim of lien against the building—it was held that the court rightly construed it as a cross-complaint, and gave judgment for the foreclosure of the lien. (*Holmes v. Richet*, 56 Cal. 307.)

Where it is charged in the complaint, for the foreclosure of a mortgage, that the defendants, (materialmen) had or claimed some interest in the mortgaged premises, it is sufficient for the latter to set up their interests in the premises by virtue of the mechanics' liens by way of answer. In such case there is no necessity for cross-complaints. (*Germania etc. Ass'n v. Wagner*, 61 Cal. 349.)

In an action to foreclose a lien for materials furnished for and used in the construction of a house for the defendant, a cross-complaint which alleges that the defendant, to avoid litigation, paid to the plaintiffs, upon a date prior to that upon which the complaint alleges the contract for the materials was made, a sum of money in excess of what was then due the plaintiffs for materials before that time furnished, and which asks judgment for the excess, does not set up a cause of action relating to or depending upon the contract or transaction upon which the action was brought, nor affect the property to which it relates, and is not authorized by section 442 of the C.C.P., and a demurrer thereto is properly sustained. (*Clark v. Taylor*, 91 Cal. 552, 27 P. 860.)

Amendments.

Sec. 417. The claim of lien cannot be amended or reformed. It must be complete in itself at the time it is filed for record in order to authorize the enforcement of a lien. (See chap. IX, sec. 255, *supra*.)

A complaint in an action by a contractor to enforce a mechanic's lien, in which the special contract between the contractor and owner of the building is stated, can be changed by amendment into an action on the contract, which may be counted on specially, or the common counts in assumpsit may be used, in accordance with the general rules applicable to such counts. (*Castiagnino v. Balletta*, 82 Cal. 250, 23 P. 127.)

Where it is shown that the building sought to be charged with a lien is upon more land than is described in the complaint, but the claim of lien is sufficient to embrace the entire building, the court should direct an amendment of the complaint to conform to the proofs. (*Willamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633.)

An amendment by the plaintiff to his complaint making the contractor a party, after the statutory time for commencing the action has passed, cannot prejudice the owner of the premises. (*Green v. Clifford*, 94 Cal. 49, 29 P. 331.)

An amended complaint based upon the same cause of action relates back to the date upon which the original complaint was filed as regards the statute of limitations. (*White v. Soto*, 82 Cal. 654, 23 P. 210.)

The refusal of the court at the trial to permit an amendment of the answer, setting up the existence of an entire system of which the completed divisions of the canal formed a part, as presenting a new issue, upon which no evidence has been offered, is harmless, where the court subsequently allowed evidence upon that issue, which was considered in that court and upon appeal. (*Pacific etc. Co. v. Bear Valley etc. Co.*, 120 Cal. 94, 52 P. 136.)

Variance. Distinction in rule as applied to pleading and proof and claim and proof.

Sec. 418. A variance between the pleading and proof is not governed by the same rules as a variance between the claim of lien and the proof. The claim of lien must contain a correct statement of the facts required by the statute, and unless so stated, no lien can be enforced; while a variance between the pleading and proof is not material unless the adverse party has been misled thereby to his prejudice. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555, s. c. 48 P. 69.)

Variance between pleading and proof.

Sec. 419. Where the complaint in each count alleges that the plaintiff therein named performed labor at the special instance and request of the defendant and that the defendant agreed to pay, etc., and the proof shows that the defendant employed one H to run a tunnel in its mine at a stipulated price, and that H employed the plaintiff to perform the work upon the tunnel at a stipulated sum per day, there is no variance. (*Parker v. Savage etc. Co.*, 61 Cal. 348; see *Hooper v. Flood*, 54 Cal. 218.)

So where some of the counts of the complaint allege a hiring by the owner, through her agent, of certain laborers at certain specified wages per day, and the court finds that all the amounts for which judgment was given were "the reasonable value of said work and materials done and furnished," there is no material variance between the complaint and findings prejudicing the substantial rights of the owner of the building. (*Green v. Clifford*, 94 Cal. 49, 29 P. 331; *Webb v. Kuns*, 54 P. 78.)

Where the complaint alleges only that materials were furnished to the contractor, the court cannot enforce a lien against the owner upon proof that materials were bought

by the owner directly from the materialman and were used in the construction of the building. (*Gibson v. Wheeler*, 110 Cal. 243, 42 P. 810.)

Proof that the contract was for the "regular market price" is not a substantial variance from an allegation that the contract was for what the materials were reasonably worth. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376; 51 P. 555, s. c. 48 P. 69.)

When there is a mistake in the complaint as to the terms of the contract with reference to the time of the payment of the price, and the contract, claim of lien and proof show the facts, the variance is immaterial. (*Webb v. Kuns*, *supra*.)

In an action to foreclose the lien of a materialman, the complaint must show, either that the building was constructed under a valid statutory contract, or that it was not; and a complaint upon one theory will not warrant a judgment rendered upon the other. (*Reed v. Norton*, 99 Cal. 617, 34 P. 333.)

Variance between pleading and claim.

Sec. 420. Where the allegations of the complaint are inconsistent with statements contained in the claim of lien, a copy of which is attached to and made a part of the complaint, a demurrer to the complaint for ambiguity and uncertainty is properly sustained. (*Frazer v. Barlow*, 63 Cal. 71.)

In this case the claim of lien stated, *inter alia*, that C and E were the reputed owners, and that the materials were furnished to B, C and E. The complaint alleged that E was the sole owner and that the materials were furnished to B and C.

A complaint is ambiguous and uncertain if it alleges that the contract on which the lien is based was "made and entered into with the defendants," and the claim of lien attached to the complaint states that the contract was made

with one of the defendants "with the full knowledge and consent of the other," and "that the work was carried on with his full acquiescence." (Palmer v. Lavigne, 104 Cal. 30, 37 P. 775.)

So, where the contract as made is different from that alleged in the complaint, the variance is material and the contract is not admissible in evidence. (Rauer v. Fay, 110 Cal. 361, 42 P. 902.)

Where the contract stated in the claim of lien is for a fixed price and the complaint is on a *quantum meruit*, the variance is fatal. (Malone v. Mining Co., 76 Cal. 578, 18 P. 772; see next section.)

Variance between proof and claim.

Sec. 421. Where the claim of lien stated that the materials were to be paid for on the basis of what they were worth, and the evidence showed that part of them were furnished at an agreed price, and the remainder without any agreement as to price, though it was testified that they were all reasonably worth the amount charged, the variance is fatal to the lien. (Reed v. Norton, 90 Cal. 590, 27 P. 426, s. c. 26 P. 767.)

So, where the claim of lien stated that the agreement between the claimant and the owner of the building was that the claimant "was to be paid for the labor done and materials furnished at what it was reasonably worth, to be paid when the work ceased," and the evidence showed that the claimant had an express contract to do the work for a specified sum, and that he did a portion of it and stopped because the owner refused to pay him, the variance between the claim of the lien and the actual contract proved is fatal. (Reed v. Norton, *supra*; see as to variance between agreed price and reasonable value, Wilson v. Nugent, 125 Cal. 280, 57 P. 1008; Wilson v. Hind, 113 Cal. 357, 45 P. 695; Wagner v. Hansen, 103 Cal. 104, 37 P. 195; Jones v. Shuey, 40 P. 17; Malone v. Mining Co., 76 Cal. 578, 18 P. 772.)

But where such a variance occurs between the allegations of the complaint and the proof, it is not fatal to the lien. (*Green v. Clifford*, 94 Cal. 49, 29 P. 331.)

Where the complaint alleges a contract to furnish the material and erect a certain specified building for the defendant, and the claim of lien leaves it uncertain whether the contract was to erect and furnish materials for one building or two, and the evidence shows that the real contract and the work actually performed was to raise up, move back and repair two houses, and furnish materials therefor, there is a material variance between the proof, the pleading and the claim of lien, in reference to the contract, and a decision of the court sustaining the lien is not supported by the evidence. (*Eaton v. Malatesta*, 92 Cal. 75, 28 P. 54; see *Cox v. Railroad*, 63 Cal. 196; *Gibson v. Wheeler*, 110 Cal. 243, 42 P. 810; *Ward v. Crane*, 118 Cal. 676, 50 P. 839.)

Though proof that the contract was for the "regular market price" is not a substantial variance from an allegation that the contract was for what the materials were reasonably worth, yet where the claim incorrectly stated the amount of the balance due as the amount of the contract price of the lumber, and that no part thereof had been paid, proof that the contract was for a considerably larger price and that payments had been made thereon, shows a fatal variance in the terms of the contract from those stated in the claim, and renders the claim defective and void. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555, s. c. 48 P. 69.)

Variance which is not fatal to lien.

Sec. 422. If the contract set out in the complaint is substantially the same as that stated in the claim of lien, there is not material variance. (*Russ L. Co. v. Garrettson*, 87 Cal. 589, 595, 25 P. 747; *Webb v. Kuns*, 54 P. 78.)

A variance of two years in the date of the contract as stated in the claim of lien and as proved, is not fatal to the

lien if the terms and conditions of the contract are correctly set forth. (*Pacific etc. Co. v. Fisher*, 109 Cal. 566, 42 P. 154.)

Where the claim of lien and complaint set forth that plaintiff was a subcontractor for the work, and the evidence showed that he was the sole and original contractor, the variance is immaterial. (*McIntyre v. Trautner*, 63 Cal. 429.)

Where the claim states that the material was furnished to a contractor or subcontractor, naming him, the claimant may, upon foreclosure of the lien, aver facts showing that the contract with the owner was void, and that he is deemed, under the statute, to have furnished the materials to the owner, and there is no material variance between the claim and such averment. (*Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 P. 860; *Coss v. MacDonough*, 111 Cal. 662, 44 P. 325; *Reed v. Norton*, 90 Cal. 590, 27 P. 426, s. c. 26 P. 767.)

Where the claim stated that the materials were furnished to a contractor and that the claimants were employed by both the contractor and the owner of the building to furnish them, and the evidence showed that the owner alone originally contracted with the claimants to furnish the material, but that it went into the building that the contractor was erecting for the owner, and for which he got them from the materialman, and that the contractor admitted his liability therefor, by giving orders for part payment on the owner, which were paid, the variance between the claim of lien and contract proved is immaterial and cannot injure the owner. (*Reed v. Norton*, *supra*.)

So when the claim of lien states that the materials were furnished to A & Co., when in fact they were furnished to A, the claim is not invalidated, for the material fact is, whether the materials were furnished for and used in the construction of the building on which the lien is claimed. (*Tibbetts v. Moore*, 23 Cal. 208; *Peterson v. Shain*, 33 P. 1086.)

The Same.

Sec. 423. Proof that the contract was for the "regular market price" is not a substantial variance from an allegation that the contract was for what the materials were reasonably worth. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555; s. c. 48 P. 69.)

So where the complaint alleges that the plaintiff performed labor at the special instance and request of the owner for which he agreed to pay, etc., and the proof shows that the plaintiff was employed by the contractor of the owner at a stipulated sum per day, there is no variance. (*Parker v. Savage etc. Co.*, 61 Cal. 348, see *Hooper v. Flood*, 54 Cal. 218; *Reed v. Norton*, 90 Cal. 590, 27 P. 426; s. c. 26 P. 767.)

Where some of the counts of the complaint allege a hiring by the owner, through her agent, of certain laborers at certain specified wages per day, and the court finds that all of the amounts for which judgment was given were "the reasonable value of said work and materials done and furnished," there is no material variance between the complaint and finding prejudicing the substantial rights of the owner of the property. (*Green v. Clifford*, 94 Cal. 49, 29 P. 331.)

Where the claim of lien describes the building remodeled as situated upon forty-eight feet of the lot, and the complaint describes the building as situated upon the entire lot, there is no material variance. (*Brunner v. Marks*, 98 Cal. 374, 33 P. 265.)

Where the work for which the claim of lien was filed consisted of the almost entire demolition of an old house and the building of a substantially new structure in its place, it is not a material variance to describe the work in the claim as the "erection" of a house. (*Ward v. Crane*, 118 Cal. 676, 50 P. 839.)

Mistakes are not material variances.

Sec. 424. Mere mistakes and misstatements of immaterial matters will not vitiate the lien. A variance, therefore, in these respects, is not fatal to the lien. (*Goss v. Strelitz*, 54 Cal. 640; see secs. 31, 295, *supra*.)

A variance in respect to matters which are not required to be stated in the claim of lien does not render it invalid. (*Harmon v. Ashmead*, 68 Cal. 332, 9 P. 183.)

A misstatement in the claim of lien of the date of the completion of the work is immaterial where the claim and the complaint allege and the proof shows that the claim was filed within thirty days after the completion of the building. (*Slight v. Patton*, 96 Cal. 384, 31 P. 248; *Harmon v. Ashmead*, *supra*.)

And a mistake in the christian name of the employer in the claim is not material where the allegations of the complaint show that the person named in the claim is the same person mentioned in the complaint. (*Jewell v. McKay*, 82 Cal. 144, 23 P. 139.)

Attachment. Right to.

Sec. 425. A party having secured a mechanic's lien under the statute, does not forfeit or waive it, by causing an attachment to be issued and levied upon property of the debtor, to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. If the party attempts to pursue them in separate actions, he may be put to his election. (*Brennan v. Swasey*, 16 Cal. 141; for right to attach materials, see sec. 323, *supra*.)

Section 1197 of the C.C.P., (which provides that nothing contained in the lien law shall be construed to impair, or affect, the right of any person to whom any debt may be due for work done or materials furnished, to maintain a personal action to recover such debt against the person liable therefor,) as originally enacted upon the adoption of

the Code of Civil Procedure in 1872, provided that the person who brought a personal action upon the debt could take out an attachment. This last provision was stricken out by the amendment of 1873-4 (amds. 1873-4, 110). (For this provision and notes on section 1197, see sec. 15, *supra*.)

Injunction. Right to.

Sec. 426. Mechanics and materialmen who perform labor upon and furnished materials for a building erected by the lessee upon leased property, and have a lien for the value thereof, are entitled to an injunction to restrain a judgment creditor of the lessee, whose judgment is younger than the lien, from removing the building from the lot, when the security is insufficient without such building. (*Barber v. Reynolds*, 33 Cal. 497, s. c. 44 Cal. 519, 532.)

Jury trial. Right to.

Sec. 427. The object of an action to foreclose a mechanic's lien upon real property is to secure the money due the lien-claimant for his labor and materials furnished in improving the same. It is, therefore, an equitable action. A mechanic's or laborer's lien is in the nature of a mortgage on the land (*Ritter v. Stevenson*, 7 Cal. 389; see chap. II, sec. 24, *supra*.) and an action for its foreclosure is a judicial proceeding in equity in which a party to the proceeding is not entitled, as a matter of right, to a jury trial. The code rule in such cases, is that "issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury," etc. Granting or refusing a demand for a jury trial in an equity case is, therefore, entirely within the discretion of the court. (*Curnow v. Blue Gravel etc. Co.*, 68 Cal. 262, 9 P. 149.)

In such action the court may submit special issues to the jury, proceed with the trial as to the other issues, and adopt the advisory verdict. (*Cummings v. Ross*, 90 Cal. 68, 27 P. 62.)

Evidence. Generally.

Sec. 428. The general rules of evidence govern in the proof of all facts necessary to establish or to defeat a lien. To entitle the plaintiff to a foreclosure of his lien, he must prove by competent evidence every material allegation of his complaint, unless proof thereof is dispensed with by admission, or in some other manner. The same rules apply to the answer.

The general rules of evidence being applicable to suits to foreclose mechanics' liens, a discussion of which rules are foreign to the scope of this work, it is proposed to bring together here those decisions only which have special bearing upon the rules of evidence peculiar to the lien law and the proceedings thereunder to enforce liens.

Where materials are furnished under a void original contract, the agreed price for materials is *prima facie* evidence of their value. (Brigham v. Knox, 59 P. 198.)

Evidence of a tenant's intention in reference to a future removal of a building erected by him upon leased premises, is inadmissible in an action to foreclose a lien of a materialman upon the land and building. (West Coast L. Co. v. Apfield, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231.)

A receipt given by a materialman expressly stating the receipt of "payment by note" is *prima facie*, but not conclusive, evidence of the facts recited, and is sufficient to sustain a finding that the note was received in payment and operated to discharge the debt for which the lien was claimed. (Jenne v. Berger, 120 Cal. 444, 52 P. 706.)

In general, agency cannot be established by the declarations and acts of its agent, yet, under the provisions of section 1183, of the C.C.P., evidence of the open and continued acts and declarations of any person having charge of the property against which a lien is claimed, is competent *prima facie* to warrant such person being held to be the agent of the owner, for the purpose of enforcing a lien upon the

property, but this may be overthrown by the owner by competent evidence on his part. (*Donohoe v. Mining Co.*, 113 Cal. 119, 45 P. 259.)

The court will take judicial notice of such expression as shafts, tunnels, etc., when applied to mines. (*Hines v. Miller*, 122 Cal. 517, 55 P. 401.)

Evidence. Admission.

Sec. 429. An admission of ownership in the separate answer of certain defendants in an action to foreclose a lien must be taken as true upon appeal, notwithstanding a finding that other defendants were owners, made upon issues joined as to their ownership. (*Goss v. Helbing*, 77 Cal. 190, 19 P. 277.)

So where the complaint upon foreclosure of the liens upon the remodeled building described it as situated upon the entire lot, and its allegations in that respect are not denied, no issue is raised as to whether or not the lien covers an entire building or only a part thereof, and the defendant cannot introduce evidence against his admissions. (*Bruner v. Marks*, 98 Cal. 374, 33 P. 265.)

Evidence. Parol to explain, etc., written contract.

Sec. 430. Where the sale of materials, employed in the construction or alteration of a building, is made by a written contract, which is silent as to the purpose for which the articles sold were intended to be used, parol evidence is admissible to show such purpose and to establish thereby a mechanic's lien in favor of the vendor. (*Donahue v. Cromartie*, 21 Cal. 80, see sec. 91a, *supra*.)

A written contract which falsely refers to specifications as being signed by the parties when in fact they are not signed, is void, and cannot be the basis of recovery, and

reference in the contract to signed specifications cannot be aided by parol evidence. (*Donnelly v. Adams*, 115 Cal. 129, 46 P. 916.)

Where, in a contract required by the statute to be in writing to be valid, there is a false reference to plans and specifications which were an essential part of the contract, it cannot be helped out by oral evidence. (*Worden v. Hammond*, 37 Cal. 61.)

The rule of parol evidence does not apply to an informal memorandum which does not in itself import any contract. (*Kreuzberger v. Wingfield*, 96 Cal. 251, 31 P. 109.)

Conclusive evidence.

Sec. 431. Where the contract provided that payments should be made on the certificate of the architect (who was required by the contract, among other things, to certify that all the work of the mechanics, laborers and others employed by the original contractor, had been paid) his certificate is conclusive of the rights of all parties concerned, unless it can be shown that it was obtained by the owner by collusion or fraud. (*Dingley v. Greene*, 54 Cal. 333.)

But such certificate is not conclusive of the time of the completion of the building where the building was, in fact, completed some ten days before the date of the certificate. (*Washburn v. Kahler*, 97 Cal. 58, 31 P. 741, see sec. 268, *supra*.)

Evidence. Estoppel of owner.

Sec. 432. Section 1187 of the C.C.P., *inter alia*, provides:

"In case any, such owner neglect to file said notice as herein required within the time herein required, then the said owner and all persons deraigning title from him, and all persons claiming an interest in said property, shall be

estopped, in any proceedings brought to foreclose any mechanics' lien or liens provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed with the time provided in this chapter."

For section 1187 in full, amendments thereto and notes thereon, see sec. 5, *supra*.

The notice referred to in the above quoted provision of section 1187 is the notice of completion required by that section to be filed for record by the owner.

Estoppel generally.

Sec. 433. The plaintiff in an action to quiet his title and who became the owner of the premises by purchase thereof at a sheriff's sale, in an action to foreclose a mortgage thereon, may go behind the decree in an action to foreclose a mechanic's lien on the premises and show that no mechanic's lien in fact existed in favor of the plaintiff in the mechanic-lien suit which latter suit was brought subsequent to the mortgage and its registration and in which the plaintiff was not made a party. (*Horn v. Jones*, 28 Cal. 195, 203.)

When an answer does not plead another action pending which had been first brought by the subcontractor of the contractor against the agent of the contracting owner to recover for a foundation built pursuant to the contract, a finding that such action was pending is outside of the issues and a judgment in such prior action against the agent of the contracting-owner cannot estop the contractor who was not a party to the former action, from recovering for the same foundation, if the court finds that it was built by the contractor and accepted by the contracting-owner. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487.)

A materialman is not estopped from enforcing his lien because he is on the contractor's bond to the owner to secure him from loss on account of the default or negli-

gence of the contractor although the contract is void because not recorded. (*Blyth v. Torre*, 38 P. 639; *Blythe v. Robinson*, 104 Cal. 239, 37 P. 904; *West Coast L. Co. v. Knapp*, 122 Cal. 79, 54 P. 533; recitals in receipted bills, *Washburn v. Kahler*, 97 Cal. 58, 31 P. 741.)

Evidence. Performance.

Sec. 434. After the claimant of a lien has introduced evidence to show that the labor for which the lien was claimed was done in a good and workmanlike manner, evidence on the part of the defendant tending to disprove that fact, and to show that the work sued for was not done in a workmanlike manner, is admissible, notwithstanding an objection that there was no issue as to the unworkmanlike character of the work. (*Hagman v. Williams*, 88 Cal. 146, 25 P. 1111.)

Where an issue is raised as to the performance of work alleged to have been done under a contract described in the complaint, and the answer alleged another contract, including extra work sued for by the plaintiff upon a *quantum meruit* count, it is competent for the plaintiff when such other contract is introduced in evidence by the defendant, to show in rebuttal that he signed it under the defendant's fraudulent misrepresentation, and never intended to sign such a contract, and supposed he was signing the one sued upon. (*Cummings v. Ross*, 90 Cal. 68, 27 P. 62.)

In the case stated it was held competent for a party to state whether in fact the work had been done according to the contract, and that such evidence did not come within the rule excluding opinions of witnesses. (*Kreuzberger v. Wingfield*, 96 Cal. 251, 31 P. 109.)

Burden of proof.

Sec. 435. Where a lien is assailed on the ground that work had formerly ceased for a period of thirty days before the last cessation of work, the burden is on the owner of the building to show that such cessation actually occurred, and

it is not enough to show that it might have occurred. (*Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164.)

There is a dictum, however, in *Lumber Co. v. Sheldon*, 32 P. 234, that the burden of proof is on the lien-claimant (plaintiff) to show completion of the building within thirty days prior to the filing of his lien.

Where an action is brought to foreclose certain liens for materials furnished by the plaintiff to and used by the defendant, A, in the construction of a certain building owned by him, and the complaint alleges that the other defendants, who alone answered, had a mortgage on the building and the land on which it was situated, and that such mortgage was subordinate and subject to the lien of plaintiff, and the defendants in the answer deny this allegation, but introduce no evidence showing priority of the mortgage, a finding that the mortgage lien was subordinate and subject to that of the plaintiff was justified since the burden of showing the priority of the mortgage lien was on the defendants. (*Harmon v. Ashmead*, 68 Cal. 321, 9 P. 183.)

Evidence of furnishing and use of materials

Sec. 436. To entitle a materialman to enforce a lien upon a building, or other structure or improvement, for materials furnished therefor, it must be proved that the materials were used in the building, etc., and that by the express terms of the contract, they were furnished to be used therein. (*Holmes v. Richet*, 56 Cal. 307; *Houghton v. Blake*, 5 Cal. 240; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890; *Roebing Sons Co. v. Bear Valley L. Co.*, 99 Cal. 488, 34 P. 80; see sec. 91a; sec. 392, *supra*.)

Proof that the materials were used in the building, etc., is not sufficient. (*Bottomly v. Grace Church*, 2 Cal. 90; *Cohn v. Wright*, 89 Cal. 86, 26 P. 643.)

But it is not necessary to prove an express agreement to pay for the materials at the time of delivery, when the

contract as stated in the claim of lien was "the usual price," or "reasonable worth at their [claimants'] place of business." (Reed v. Norton, 90 Cal. 590, 27 P. 426, s. c. 26 P. 767.)

Where the right to a lien is based upon a claim for extra work there must be special proof as to what constitutes such extra work. (Sweeney v. Meyers, 124 Cal. 512, 57 P. 479.)

Rescind contract as evidence. Contract modified by parol.

Sec. 437. Where a contract has been rescinded, it is admissible in evidence as proof of the value of the materials furnished and services rendered, but it is not conclusive on that point and is to be taken with the other evidence in arriving at such value. (Adams v. Burbank, 103 Cal. 646, 37 P. 640.)

So where the contract has been performed by the plaintiff and suit is brought by him upon a common count in *assumpsit*. (Castagnino v. Buletta, 82 Cal. 250, 23 P. 127.)

Where a written contract was made between the contractor and the owner for the erection of a building which is subsequently modified by oral agreement of the parties, such modification is properly provable by parol evidence and the written contract is also admissible in evidence. (White v. Sota, 82 Cal. 654, 23 P. 210.)

Void contract as evidence.

Sec. 438. A void original contract does not mark the extent of the recovery of lien-holders. The extent of the recovery in such case is measured by the provisions of the statute and not by the terms of the contract. (Kellogg v. Howes, 81 Cal. 170, 22 P. 509; Lumber Co. v. Gottschalk, 81 Cal. 641, 22 P. 860; Willamette etc. Co. v. Coliege Co., 94 Cal. 230, 29 P. 629, overruling Powder Co. v. Flume Co., 78 Cal. 193, 20 P. 419.)

Such contract, however, is competent evidence to show the relation of the owner and the contractor. (*Powder Co. v. Flume Co.*, 78 Cal. 193, not overruled on this point by cases, *supra*.)

And is also competent evidence of the completion of the work or of the building. (*Powder Co. v. Flume Co.*, *supra*; *Baker v. Doherty*, 97 Cal. 10, 31 P. 1117; *Joost v. Sullivan*, 111 Cal. 286, 292, 43 P. 896,) and may be looked to to determine what should be treated as a part of the building. (*Macomber v. Bigelow*, 58 P. 312.)

Such contract is also *prima facie* evidence of the value of the materials furnished and labor performed. (*Booth v. Pendola*, 88 Cal. 36, 25 P. 1101; *Joost v. Sullivan*, *supra*; overruling *dictum* in *Rebman v. San Gabriel etc. Co.*, *infra*; see *Cox v. Railroad*, 52 Cal. 590.)

But in an action to recover the reasonable value of the labor and materials it is not conclusive evidence of value. (*Rebman v. San Gabriel etc. Co.*, 95 Cal. 390, 30 P. 564; see *Adams v. Burbank*, 103 Cal. 646, 37 P. 640.)

Such contract is not evidence of the time when any payment was to be made under its terms. (*Willamette etc. Co. v. College Co.* *supra*.)

A contract, however, made in violation of section 1184 of the C.C.P. is not "wholly void," (see chap. VIII, sec. 198.) It would seem, therefore, that such contract is and remains valid for every purpose except that of measuring the extent of liens which may be claimed and enforced against the property of its owner and that its competency as evidence or the rights of personal action growing out of it, is not impaired.

Findings. Generally.

Sec. 439. If the court finds contrary to facts admitted by the answer, the finding must be disregarded. (*Bradbury v. Cronise*, 46 Cal. 287; see *Peterson v. Shain*, 33 P. 1086.)

A finding that a building was completed "on or about" a certain date is insufficient where the exact date of completion is material, a difference of one day being the issue. (*Cohn v. Wright*, 89 Cal. 86, 26 P. 643.)

A statement among the conclusions of law that as a conclusion from the foregoing findings of fact "The liens of the plaintiff and each of them were not filed within the time required by law," is a conclusion of law, and not a finding of fact. (*Pierce v. Willis*, 103 Cal. 91, 36 P. 1080; but see *Hamilton v. Mining Co.*, 118 Cal. 145, 50 P. 378.)

A finding that one was the reputed owner of the premises as alleged in the claim of lien, is not impaired by the fact that conveyances to other persons were of record. (*Kelley v. Lemberger*, 46 P. 8.)

Where several actions have been consolidated there should be but one set of findings. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; *Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164.)

A finding upon an immaterial issue is not necessary. (*Gray v. Wells*, 118 Cal. 11, 50 P. 23.)

For sufficiency of finding as to lien and notice of lien. (See *Barilari v. Ferrea*, 59 Cal. 1.)

Of time of filing claim (conclusion of law) (*Pierce v. Willis*, 103 Cal. 91, 36 P. 1080.)

Of filing and contents of lien. (*Russ L. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747.)

Of ownership of land. (*Dusey v. Prudom*, 95 Cal. 646, 30 P. 798.)

Of work and labor done under invalid contract. (*Rebman v. San Gabriel etc. Co.*, 95 Cal. 390, 30 P. 564.)

Of trivial perfection. (*Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164.)

Of mines operated as one claim. (*Hamilton v. Delhi M. Co.*, 118 Cal. 148, 50 P. 378.)

Of completion of building. (*Santa Monica etc. Co. v. Hege*, 119 Cal. 376, 51 P. 555, 48 P. 69.)

Of character of improvements. (*Evans v. Johnson*, 120 Cal. 282, 52 P. 585.)

Of performance of contract. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487.)

Of amount due and unpaid. (*Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

Of abandonment. (*Cohn v. Wright*, 89 Cal. 86, 26 P. 643.)

Upon counter-claim for damages for non-performance. (*Rebman v. Gabriel etc. Co.*, *supra*.)

For findings which were held not to be inconsistent, see (priority of lien), (*Avery v. Clark*, 87 Cal. 619, 25 P. 919; *Griffith v. Happersberger*, *supra*; *Marble L. Co. v. Hotel Col*, *supra*; *Harlan v. Stufflebeem* (performance), 87 Cal. 508, 25 P. 686; *Gray v. Wells*, 118 Cal. 11, 50 P. 23.)

For findings inconsistent but not ground for reversal. (See *Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629 (completion of building); *Lumber Co. v. Hotel Co.*, *supra*.)

Findings. Amount and extent of land.

Sec. 440. A finding that the whole of defendant's land was required for the convenient use and occupation of the structure will not sustain the judgment where there is no allegation in the complaint upon that point. (*Green v. Chandler*, 54 Cal. 626.)

Where the complaint alleges that all of certain land is necessary for the convenient use and occupation of the structure, a finding that the allegation of the complaint is true, is sufficient. (*Dusy v. Prudom*, 95 Cal. 646, 30 P. 798. see sec. 396, *supra*.)

Facts necessary to be found.

Sec. 441. The general rule is that a finding is necessary upon every issue raised by the pleadings. This rule must be observed. It is intended in this section to mention those decisions only in which the court has had particular findings under consideration and in particular cases adjudged what facts must be found.

A finding is necessary that the materials were used in the building, etc., upon which the lien is claimed and also that by the express terms of the contract such materials were furnished to be used in such building, etc. (*Bottomly v. Grace Church*, 2 Cal. 90; *Houghton v. Blake*, 5 Cal. 240; *Holmes v. Richet*, 56 Cal. 307; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890; *Bewick v. Muir*, 83 Cal. 368, 23 P. 339; *Wilson v. Nugent*, 125 Cal. 280, 57 P. 1008; see sec. 91a, *supra*.)

Where the contract is void there must be a finding of the value of the work performed and of the materials furnished. (*Booth v. Pendola*, 88 Cal. 36, 41, 25 P. 1101.)

Where it is sought to subject more land than that covered by the building or structure to the lien, there must be a finding based upon proper allegations in the complaint to show that such additional land is necessary for the convenient use and occupation of the building or structure. (*Wilamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633; *Green v. Chandler*, 54 Cal. 626; *Dusy v. Prudom*, 95 Cal. 646, 30 P. 798; see chap. VI, sec. 126, *supra*.)

Where the priority of different liens claimed upon the same property is an issue, there must be a finding upon that issue and also upon the question of notice, if that also be in issue. (*Root v. Bryant*, 57 Cal. 48; *Bewick v. Muir*, *supra*.)

The same rule applies to the issue of fraud. (*Bewick v. Muir*, *supra*.)

Facts not necessary to be found.

Sec. 442. In an action by an assignee to foreclose a lien for materials, it is not necessary to support the judgment for the plaintiff that the findings should show that the assignment of the claim on which the lien is based was in writing. (*Patent Brick Co. v. Moore*, 75 Cal. 205, 16 P. 890. See sec. 383, *supra*.)

Where facts are admitted by the pleadings, no issue is raised and no finding thereon is necessary. (*Orlandi v. Gray*, 125 Cal. 372, 58 P. 15.)

And in such case if there be a finding, it may be treated as surplusage. (*West Coast L. Co. v. Apfield*, 86 Cal. 335, 24 P. 993, s. c. 22 P. 231.)

The attorney's fee is fixed by the court, irrespective of any averment in the complaint, and no finding as to the amount of such fee is necessary. (*Clancy v. Plover*, 107 Cal. 272, 40 P. 394; see sec. 400, *supra*.)

Findings outside of issues and not supported by evidence.

Sec. 443. A finding outside of the issues made by the pleadings will not support a judgment where such finding is material to support a cause of action. (*Rosekranz v. Wagner*, 62 Cal. 151; *Reed v. Norton*, 99 Cal. 617, 34 P. 333; *Lothian v. Wood*, 55 Cal. 159.)

Where, however, the complaint did not allege that any money was due the contractor, but the answer presented that issue, and the court found thereon, a judgment consistent with the case as presented may be given as provided by section 580 of the C.C.P. (*O'Donnell v. Kramer*, 65 Cal. 353, 4 P. 204.)

A finding without any evidence to sustain it, will not support a judgment based thereon. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 137, 487; *Washburn v. Kahler*, 97 Cal. 58, 31 P. 741; *Roebling Sons Co. v. Bear Valley etc. Co.*, 99 Cal. 448, 34 P. 80.)

A complaint which proceeds on the theory that there was no valid written contract for the erection of the building, but that plaintiffs dealt directly with the owner of the building, and that he is liable for the whole of their claims, will not warrant a judgment based upon findings that there was such a contract and that plaintiffs dealt directly with the contractor and not with the owner. (*Reed v. Norton*, 90 Cal. 590, 27 P. 426, s. c. 26 P. 767.)

Effect of failure to find.

Sec. 444. A materialman is entitled to recover only for the material furnished between the dates stated in his claim of lien, and where there is no finding as to the quantity furnished between those dates, a new trial is necessary. (*Goss v. Strelitz*, 54 Cal. 640.)

If there is no finding that the materials furnished for the working of a mining claim were used in the work done on the mine, there can be no lien therefor.

Failure to find upon issues the facts of which are admitted by the pleadings, is harmless. A finding in such case is not necessary. (*Orlandi v. Gray*, 125 Cal. 372, 58 P. 15.)

Where, however, an issue is raised, there must be a finding on such issue. (*Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

But where an issue is raised by the averments of the answer, and no evidence is offered in support of the averment, no finding on such issue is necessary. (*Marchant v. Hayes*, 117 Cal. 669, 49 P. 840.)

See *Washburn v. Kahler*, 97 Cal. 58, 31 P. 741, where failure to find upon issue of estoppel was held not to be error.

Judgment generally.

Sec. 445. After the consolidation of several separate actions for the foreclosure of liens as provided in section 1195 of the C.C.P., the actions should be treated as a single action and a single judgment should be entered directing a

sale of the property affected by the liens and the application of the proceeds to the satisfaction of the amounts due the respective lienors. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629; *Marble Lime Co. v. Hotel Co.*, 96 Cal. 332, 31 P. 164.)

But error in this respect is not in itself sufficient cause for reversal. (*Willamette etc. Co. v. College Co.*; *Marble Lime Co. v. Hotel*, *supra*.)

A judgment against the contractors to whom the materials were furnished is not necessary to support the lien of materialman though the contractors are made parties defendant and no judgment is taken against them. (*Russ L. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747.)

A judgment is not unintelligible because it is not stated therein which of several defendants shall pay the amount found due plaintiffs, where the judgment simply decrees a lien upon the property. (*Neihaus v. Morgan*, 45 P. 255.)

Where a lien had expired before the commencement of the action to foreclose it, and judgment of foreclosure was taken by default, it is not error for the court of its own motion, on the day following the rendition of the judgment to modify the judgment to a money judgment only. (*Lacore v. Leonard*, 45 Cal. 394.)

The court may properly set aside a judgment entered upon the verdict of a jury in an equity case, where it appears that it had been inadvertently entered by the clerk, without judicial sanction, when other issues of fact remained to be determined by the court, and the court may proceed with the trial of such issues, and may adopt the advisory verdict of the jury upon the special matter therein involved, make findings as to the other issues and have a new judgment entered. (*Cummings v. Ross*, 90 Cal. 68, 27 P. 62.)

The same.

Sec. 446. Where several fictitious persons were named as defendants, but were not served and did not appear, and no objection was made to proceeding with the trial of the cause, the court is authorized under section 579 of the C.C.P. to render judgment against the owner, without determining the liability of the other defendants. (*Kelley v. Plover*, 103 Cal. 35, 36 P. 1020.)

A judgment for work and labor performed may be made payable in gold coin, if there is a promise to pay in gold coin. (*Bradbury v. Cronise*, 46 Cal. 287.)

The failure of the judgment to adjudge that at the commencement of the action the land belonged to the person who caused the building to be constructed, or that it was erected with his knowledge, does not render the judgment erroneous when it is alleged and found that the defendant at whose instance the building was erected was at all times mentioned the owner and entitled to the possession of the property; and that the interests of the other defendants who claimed to have some interest therein were subsequent to the plaintiff's lien. (*Dusy v. Prudom*, 95 Cal. 646, 30 P. 798.)

Where several liens are upon the same mining claim and the several lien-claimants are joined in one action to foreclose their several liens, the court can adjust the rights of the parties by its decree. (*Malone v. Big Flat etc. Co.*, 76 Cal. 578, 18 P. 772; *Bewick v. Muir*, 83 Cal. 368, 23 P. 389.)

The nature of the interest to be sold under a decree of sale is sufficiently ascertained by a lease, which is referred to and described in the decree. (*Gaskill v. Moore*, 4 Cal. 233.)

Judgment. Extent of land subject to lien. How determined.

Sec. 447. Section 1185 of the C.C.P. provides that "The land upon which any building, improvement, well or structure is constructed, together with a convenient space

about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien," etc.

For this section in full, amendments thereto and notes thereon, see sec. 3, *supra*; the clause "to be determined by the court on rendering judgment," was added to this section by the amendment of 1873-4. See notes referred to.

Where the decree described the land around the building on which a lien was claimed in these words "with such convenient space of land around the same (building) as may be required for the convenient use and occupation thereof," it is doubtful whether the purchaser at the foreclosure sale would acquire any land beyond that covered by the building. (*Tibbetts v. Moore*, 23 Cal. 208.)

So, where the court fails to define the exact amount or extent of land necessary for the building, the decree is not invalidated, though it may be that the purchaser would acquire no more land than that covered by the building. (*Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932; *Tibbetts v. Moore*, *supra*.)

The land upon which the building is constructed is necessarily subject to the lien (*Sachse v. Auburn*, 95 Cal. 650, 30 P. 800, sec. 1185 C.C.P.), to the extent of the owner's interest therein, but if the plaintiff would claim that more than that is required for the convenient use and occupation of the building, he must make appropriate averments therefor, and the amount of land thus to be made subject to the lien can be determined by the court only when such issue is presented by the pleadings. (*Willamette etc. Co. v. Kremer*, 94 Cal. 205, 29 P. 633; *Green v. Chandler*, 54 Cal. 626.)

A judgment need not adjudge that the land directed to be sold is all necessary for the convenient use and occupation of the building, where the complaint alleges that all of the land is necessary for such purpose and the court finds such allegation to be true. (*Dusy v. Prudom*, 95 Cal. 646, 30 P. 798.)

And in the absence of evidence as to the size of the lot, it will be presumed upon appeal in support of the judgment where there are proper allegations in the complaint upon which no issue is raised by the answer, that the whole of the lot described is necessary for the convenient use and occupation of the building. (*Ward v. Crane*, 118 Cal. 676, 50 P. 839.)

Deficiency judgment.

Sec. 448. The amendment of 1873-4 to section 1194 of the C.C.P., added this clause:

“And whenever, in the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages.”

(For this section in full, amendments thereto and notes thereon, see sec. 12, *supra*; section 726 of the C.C.P. provides for entering the deficiency judgment in suits for the foreclosure of mortgages.)

In an action to foreclose a lien upon a structure in favor of laborers or materialmen to which the contractor and the owner are parties defendant, where a personal action against the owner is united with a suit against the owner, the judgment may direct that any deficiency arising from the sale of the property shall be docketed against the contractor. (*Powder Co. v. Flume Co.*, 78 Cal. 193, 20 P. 419.)

A materialman or mechanic may maintain an action to subject the unpaid portion of the contract price to the payment of his claim without seeking to enforce the lien against the building, and in such action may obtain a judgment for any deficiency there may be against the person to whom the materials were furnished or for whom the work was done. (*Bates v. Santa Barbara Co.*, 90 Cal. 513, 27 P. 438.)

A lien-claimant is not entitled to a deficiency judgment against the owner even if the original contract is void for want of record. (*Madera Flume Co. v. Kendall*, 120 Cal. 182, 52 P. 304.)

It is necessary that the court should ascertain and determine the amount for which the person personally liable to the plaintiff, is liable to the plaintiff, in order that, when after sale of the property the return of the sheriff comes in, it may be seen whether there is a deficiency in the proceeds of the sale. (*Hines v. Miller*, 59 P. 142.)

Under the above provisions of section 1194, there can be no deficiency judgment docketed until after a sale by the sheriff and his return showing a deficiency of proceeds. (*Hines v. Miller*, *supra*.)

Personal judgment.

Sec. 449. A contractor whose contract is void is not entitled to a lien for the value of his work done thereunder. (Sec. 1183 C.C.P.) He can only recover a personal judgment against the owner for the value of the work done as upon an implied contract. (*Morris v. Wilson*, 97 Cal. 644, 32 P. 801.)

The owner is not personally liable for the debts of the contractor and is not under obligation to pay his materialmen or laborers. (*Adams v. Burbank*, 103 Cal. 646, 37 P. 640; see chap. XIV, sec. 364, *supra*.)

The owner is personally liable solely to the contractor and his liability to any other person is only such as may be fastened upon him under the lien law. (See chap. XIV, sec. 361, *supra*.)

No lien-claimant, in case of a void original contract, is entitled to a deficiency judgment against the owner. (*Madera etc. Co. v. Kendall*, 120 Cal. 182, 52 P. 304; *Santa Clara etc. Co. v. Williams*, 31 P. 1128.)

And it follows that where there is no personal liability on the part of the owner, a personal judgment cannot be entered against him. (*Phelps v. Mining Co.*, 49 Cal. 336; *Barber v. Reynolds*, 44 Cal. 519.)

But where the claim of lien is insufficient the claimant is entitled to a personal judgment for the amount due him against the contractor, or the person for whom he furnished labor or material, and it is error to grant a non-suit. (*Ascha v. Fitch*, 46 P. 298; see as to jurisdiction, sec. 365, *supra*.)

Creditors of the contractor who have no lien upon the building and premises of the owner, are entitled only to a money judgment against the contractor, and are not entitled to a judgment providing that the remainder of the fund due from the owner to the contractor after the payment of the liens, shall be distributed between them. (*Kennedy-Shaw L. Co. v. Priet*, 113 Cal. 291, 45 P. 336; s. c. 115 Cal. 98, 47 P. 109; *Kennedy-Shaw L. Co. v. Dusenbery*, 116 Cal. 124, 46 P. 1008.)

A personal judgment against the contractor is not necessary to support the lien. (*Russ L. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747; *Yancy v. Norton*, 94 Cal. 558, 29 P. 1111; nor against the owner, *Chamber v. Gottschalk*, 81 Cal. 641, 647, 22 P. 860.)

Where one of several plaintiffs in a consolidated action is non-suited at the instance of the owner, such plaintiff is still a party to the action and may have judgment against the contractor who has defaulted. (*Kennedy-Shaw L. Co. v. Dusenbery*, *supra*.)

An action to enforce a mechanic's lien is in the nature of a proceeding *in rem*, in which no personal judgment can be recovered against the estate of the deceased owner payable in due course of administration. (*Booth v. Pendola*, 88 Cal. 36, 25 P. 1101.)

Where a lien had expired before the commencement of the action to foreclose it, and judgment of foreclosure was taken by default, it is not error for the court, of its own motion, on the day following the rendition of judgment, to modify the judgment to a money judgment only. (*Lacore v. Leonard*, 45 Cal. 394.)

Judgment. Rank of liens. The statute.

Sec. 450. Section 1194 of the C.C.P. provides:

"In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens [73-4, 85] which shall be in the following order, viz:

1. All persons performing manual labor in, on or about the same;
2. Persons furnishing materials;
3. Subcontractors;
4. Original contractors. [73-4, 85]

And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank," etc.

(For section 1194 in full, amendments thereto and notes thereon, see sec. 12, *supra*.)

Judgment. Rank of liens. The decisions.

Sec. 451. By the provisions of section 1194 of the C.C.P. quoted in the next preceding section of this chapter, it is made the duty of the court to determine, in its judgment, the rank of each lien, or class of liens, in the order of the rank there stated.

It is error for the court to refuse to distribute the proceeds as between different claimants and classes *pro rata* in conformity with the statute. (*Moxley v. Shepard*, 3 Cal. 64.)

The statute places all lien-claimants belonging to the same class upon the same equality. (See *Perry v. Brainard*, 8 P. 882.) This rule, however, would not apply where some of the mechanics began their work before a mortgage was executed by the owner of the property; and some afterwards. In such case, the first lien-holders would have priority over the mortgage while the latter would not. The first class would be paid in full before the mortgage;

then the mortgage; then the last class, each lien-holder having equal claims with the others of his class. (Crowell v. Gilmore, 18 Cal. 370; Barber v. Reynolds, 44 Cal. 519, 534.)

Section 1194 of the C.C.P. applies only to cases where "different liens are asserted against any property." In other words, the right of lien-claimants must have ripened into a lien. It does not, therefore, apply to the notice which may be served upon the owner under the provisions of section 1184 of the C.C.P., unless claims of lien are subsequently filed for the demand set forth in the notice (Wanka v. Klock, Superior Court of L. A. Co., 1896, Judge Shaw; Orange County v. Griffith, *Id.*, 1897.)

A subcontractor may include in his claim the value of the work done by his employees upon the building. Such employees are also entitled to file liens for such labor but where both the subcontractor and his employees file claims for the same labor, a court of equity should render judgment in favor of each according to the amount which it should determine each was entitled to receive. (Macomber v. Bigelow, 58 P. 312.)

Attorney's fee, generally.

Sec. 452. Section 1195 of the C.C.P., *inter alia*, provides that:

"The court must also allow, as a part of the costs * * * reasonable attorneys' fees in the Superior and Supreme Courts, such costs and attorneys' fees to be allowed to each lien-claimant whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action or separate actions are consolidated."

Under this section, to entitle the claimant to attorney's fee, he must "establish" his lien. If he fails to do this, he is not entitled to be allowed attorney's fee. (Pacific etc. Co. v. Fisher, 106 Cal. 224, 39 P. 758.)

A reasonable attorney's fee, though not a part of the costs, is a necessary incident to a judgment for plaintiff in an action to foreclose a mechanic's lien. (*Rapp v. Spring Valley etc. Co.*, 74 Cal. 532, 16 P. 325.)

It is not a part of the costs but an incident to the foreclosure of the lien. (*McIntyre v. Trautner*, 78 Cal. 449, 21 P. 15; *Lumber Co. v. Neal*, 94 Cal. 192, 29 P. 622; *Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144.)

The amount of the fee is to be fixed by the court. It is not necessary to the allowance of the fee that the plaintiff should have actually paid or expressly agreed to pay one to his attorney; an implied agreement is sufficient. (*Rapp v. Spring Valley etc. Co.*, *supra*.)

The amount of the fee is to be fixed by the court. (*Pacific etc. Co. v. Fisher*, *supra*; *Clancy v. Plover*, 107 Cal. 272, 40 P. 394.)

And will not be set aside unless clearly unreasonable. (*Stimson Mill Co. v. Riley*, 42 P. 1072.)

It is not necessary to aver in the complaint what was paid by plaintiff for filing and recording claim of lien, or what sum would be a reasonable attorney's fee in the Superior and Supreme Courts. (*Mulcahy v. Plover*, *supra*.)

The amount of the fee is fixed by the court irrespective of any averment in the complaint, and the court may allow a fee in excess of the amount designated in the complaint. (*Pacific etc. Co. v. Fisher*, *supra*, overruling *Skym v. Weske Con. Co.*, 47 P. 116.)

An allegation relative to the attorney's fee is unnecessary and does not bind the party making it and no issue is raised. (*Clancy v. Plover*, *supra*.)

In a consolidated action to foreclose several liens, attorneys' fees of one hundred dollars each, were allowed to two claimants who had separate attorneys and who filed separate complaints and were adjudged \$293.23 and \$107.64 respectively. The other eight plaintiffs had other attorneys and joined in a complaint on claims aggregating \$663.02

and were allowed one hundred dollars attorneys' fees, to be apportioned ratably according to the several judgments. The trial was of considerable length and it was held that the allowance of attorneys' fees was not excessive. (*Sweeney v. Meyer*, 124 Cal. 512, 57 P. 479.)

Attorney's fee in excess of the contract price.

Sec. 453. In an action against the owner of the building and the contractor to foreclose mechanics' liens, the action of the contractor in permitting his default to be entered, is in effect an admission that the plaintiffs are entitled to the money, and where the owner of the building retains the balance of the twenty-five per cent. due the contractor in his hands, and apparently without cause or right raises a contest on every point and fights the case to the end, his liability is not limited to the amount due the contractor, but costs and counsel fees are properly allowed and made payable out of the proceeds of the property ordered to be sold to satisfy the liens. (*DeCamp L. Co. v. Tolhurst*, 99 Cal. 632, 34 P. 438.)

But where the owner pays the amount due to the contractor on the contract into court for the use and benefit of lien-claimants, this amount is the limit of his liability and lien-claimants are not entitled to costs or attorneys' fees against him. (*Kelch v. Tally*, Superior Court L. A. Co., 1898, Judge Shaw.)

When lien-claimant not entitled to attorney's fee.

Sec. 454. Section 1195 of the C.C.P. was intended to give counsel fees to lien-claimants only when they succeeded in foreclosing their liens. If they finally fail, they are not entitled to such fees. (*McIntyre v. Trautner*, 78 Cal. 449, 21 P. 15.)

A materialman or mechanic may maintain an action to subject the unpaid portion of the contract price in the

hands of the owner to the payment of his claim without seeking to enforce his lien against the building, but in such action he is not entitled to recover for any attorney's fee, or for expenses incurred by him in filing a notice of lien against the building. Under section 1195 of the C.C.P., such items are only recoverable in actions to enforce liens. (*Bates v. Santa Barbara Co.*, 90 Cal. 544, 27 P. 438.)

A contractor who has entered into a written contract with the owner of the land for the construction of a building thereon for an amount in excess of one thousand dollars, but who fails to have the contract therefor recorded, is not entitled to a lien for the value of the work done thereunder. He can only recover a personal judgment against the owner for the value of the work as upon an implied contract, without any allowance for counsel fees or expenses of preparing and recording a mechanic's lien. (*Morris v. Wilson*, 97 Cal. 644, 32 P. 801; *Central etc. Co. v. Center*, 107 Cal. 193, 40 P. 334.)

So where the lien-claimant fails to show that he filed any claim of lien, he cannot enforce his lien, and it is error for the court to allow him counsel fees or any amount for filing his claim of lien. (*Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758.)

The lien-claimant is not entitled to recover anything for an attorney's fee paid for preparing his claim of lien. (*Mulcahy v. Buckley*, 100 Cal. 484, 35 P. 144.)

Attorney's fee upon appeal.

Sec. 455. Where an appeal is dismissed in the Supreme Court, the court below will be directed to allow as additional costs in the case, a reasonable attorney's fee for the services of the attorney for the respondent (claimant) in the Supreme Court. (*Smith v. Solomon*, 84 Cal. 537, 24 P. 286.)

Where the judgment in favor of the claimant is modified on appeal, the Superior Court upon return of the remittitur, has power to allow the claimant a reasonable attorney's

fee for services in the Supreme Court notwithstanding rule 24 of that court provides for costs to be awarded to the appellant in cases where the judgment is modified. (*Lumber Co. v. Neal*, 94 Cal. 192, 29 P. 622.)

The Superior Court has the power to allow attorney's fee for service in the Supreme Court. (*Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758; *West Coast L. Co. v. Newkirk*, 80 Cal. 275, 22 P. 231.)

Upon affirmance of an appeal from a judgment enforcing a mechanic's lien, the Supreme Court will not make any directions to the lower court respecting the allowance of an attorney's fee for defending the appeal. Under section 1195 of the C.C.P. that matter rests exclusively with the trial court. (*San Joaquin L. Co. v. Welton*, 115 Cal. 1, 46 P. 1057; *Evans v. Judson*, 120 Cal. 282, 52 P. 585; *Lumber Co. v. Neal*, *supra*.)

Such direction however was made in *Harlan v. Stufflebeem*, 87 Cal. 508, 513, 25 P. 686.

A claimant of a mechanic's lien is entitled upon the affirmance upon appeal of a judgment in his favor, to a reasonable sum for attorney's fee in the appellate court. (*Clark v. Taylor*, 91 Cal. 552, 27 P. 860.)

But the plaintiff is not entitled to recover an attorney's fee for services rendered upon appeal to the Supreme Court in which he is successful, when on a re-trial final judgment is rendered against him on the merits. (*McIntyre v. Trautner*, 78 Cal. 449, 21 P. 15.)

The discretion of the trial judge in fixing the amount of attorneys' fees and apportioning the amount between the respective claimants of liens, will not be disturbed upon appeal when there is no abuse of discretion. (*Sweeney v. Meyer*, 124 Cal. 512, 57 P. 479.)

Interest on demand.

Sec. 456. Interest may be allowed upon the liens of claimants up to the time of entering judgment upon the principal sum found due from the date of payment, where the contract prescribed the time of payment; and where no time for payment is provided, interest may be allowed from the time of filing a complaint to foreclose the lien. (*Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758; see sec. 3287, Civil Code.)

But in an action of *quantum meruit*, where the amount, character and value of the labor and material can only be established by evidence, interest cannot be allowed prior to the decision of the case.) *Macomber v. Bigelow*, 123 Cal. 532, 56 P. 449; s. c. 53 P. 312.)

Interest on respective payments under a building contract should be allowed from the time they are due. (*Knowles v. Baldwin*, 57 P. 988.)

For the right to interest on claims as against a subsequent mortgage, see *Gamble v. Voll*, 15 Cal. 508.

Costs.

Sec. 457. Where one of several plaintiffs is nonsuited in a consolidated action, the owner is entitled to judgment against him for costs. (*Kennedy etc. Co. v. Dusenbery*, 116 Cal. 124, 47 P. 1008.)

Orders given by the contractor upon the owner in favor of laborers operate as an assignment by the contractor of his demand *pro tanto*, and if the owner refuse to pay the orders when he is indebted to the contractor in excess of the amount of the orders, the owner should not be permitted to recover from or offset against the contractor, the costs and expenses incurred by reason of his refusal. (*Adams v. Burbank*, 103 Cal. 646, 37 P. 640.)

In an action to foreclose liens of materialmen and subcontractors in the city and county of San Francisco, the plaintiffs as the prevailing parties are entitled to recover as costs the percentage on the amount recovered, fixed by the act of February 9, 1866. (*Golden Gate etc. Co. v. Sahrbacher*, 105 Cal. 114, 38 P. 635.)

Execution and sale.

Sec. 458. Where the action is to foreclose a mechanic's lien upon the property of the owner, plaintiff may recover the costs of filing the lien and attorney's fees which can not be recovered in a personal action, and there is no mode of enforcing the judgment other than by a sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor, and no execution as upon a mere personal judgment can be issued, unless by direction of the court upon a showing that the property upon which the lien was adjudged, is no longer available. (*Central etc. Co. v. Center*, 107 Cal. 193, 40 P. 334.)

Upon the foreclosure of liens upon the land of the lessor, it is not required first to sell the leasehold interest before selling the land where the term has expired, and there is nothing in the record to show that the lease was renewed. (*Evans v. Judson*, 120 Cal. 282, 52 P. 585.)

Redemption.

Sec. 459. Where a mechanic's lien attached on certain premises January 18, 1856, and a mortgage was placed on the same property February 21, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate, it was held that the right of the mortgagees to redeem the premises, by paying off the incumbrance of the mechanic's lien, was not affected by the decree and the proceedings thereunder, and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the right to redeem by bill in equity. (*Whitney v. Higgins*, 10 Cal. 547.)

A mortgagee whose lien is subsequent to that of a materialman, if not made a party to the suit to foreclose the lien of the materialman, may bring a suit in equity to redeem the premises, upon paying the money justly due, interest, costs, etc., where the premises have been sold under the judgment in the mechanic's lien suit. (*Gamble v. Voll*, 15 Cal. 508.)

Appeal. Notice of. Undertaking on. Generally.

Sec. 460. The provisions of part II of the Code of Civil Procedure, relative to new trials and appeals except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in the lien law. (Sec. 1199 C.C.P., sec. 17, *supra*.)

The notice of appeal must be served upon all adverse parties whose interests would be affected by a reversal of the judgment. (*Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758, mortgagor; *Lancaster v. Maxwell*, 103 Cal. 67, 36 P. 951, contractor; *Williams v. Mining Co.* 66 Cal. 193, 5 P. 85.)

But need not be served upon the contractor when the appeal is not from the part of the judgment affecting him. (*Roynance v. Hotel Co.*, 74 Cal. 273, 15 P. 777, 20 P. 573; s. c. 15 P. 777.)

Or, upon the owner when liens have been decreed against his property and the appeal is from that part of the judgment enforcing the liens, because the falsification of the liens would beneficially and not injuriously affect the rights of such owner. (*Pacific etc. Co. v. Fisher*, *supra*.)

A bond to stay execution upon appeal from a decree foreclosing a mechanic's lien must be given under section 945 of the C.C.P., concerning appeals from judgments or orders directing the sale of real property, and a mere bond in double the amount of the judgment, against the owner of the premises, not conditioned as required by section 945, does not have the effect to stay the execution of the judg-

ment. (*Central etc. Co. v. Center*, 107 Cal. 193, 40 P. 334; *Corcoran v. Desmond*, 71 Cal. 100, 11 P. 815.)

The fact that causes were consolidated by order of the court below upon consent of counsel for the respective parties will not entitle them to be considered together upon appeal, if there were separate motions for new trials, separate bills of exceptions, and separate appeals, in each case, and each is present to the appellate court upon its own record. (*Harmon v. Railroad*, 86 Cal. 617, 25 P. 124.)

The better practice, however, is to have a single set of findings, a single judgment, etc. (*Willamette etc. Co. v. College Co.*, 94 Cal. 229, 29 P. 629.)

Presumption upon appeal.

Sec. 461. It cannot be presumed upon appeal, in support of the findings and judgment, that no notice other than that expressly found by the court, and prior to it in point of time, was served on the owner of the structure. Nor where the court found that a contract was entered into and that it was performed, can it be presumed upon appeal, without proof, that a contract was void for want of filing, or for any other reason. (*First Natl. Bank v. Perris I. Dist.*, 107 Cal. 55, 40 P. 45.)

The omission of the court to find whether the owner had made payment to the contractor, as alleged in the answer, cannot be considered as error, where it does not appear from the record that evidence was offered in support of the averment. (*Marchant v. Hayes*, 117 Cal. 669, 49 P. 840.)

And where the record upon appeal does not disclose the basis of judgments in favor of lien-claimants, or in what respect they were connected with the contract to erect the building, and it does not appear that any request was made to the court below to set them off against the demand of the contractor, or what evidence was given or finding made in reference thereto, it cannot be presumed upon appeal

that the court erred in its judgment in not making such set off. (*Marchant v. Hayes*, *supra*; see *Warner v. Hopkins*, 110 Cal. 506, 42 P. 986.)

Where a default has been entered against one of two defendants, for failure to answer the original complaint, the failure to serve amended complaints on such defendant will not be ground for reversal of the judgment, where the record does not show that such amended complaints were not served. (*Heinlen v. Erlanger*, 3 P. 129.)

It will be presumed upon appeal from the judgment, in the absence of a showing to the contrary, where the court finds that the lien is for repairs and improvements upon certain property, that the evidence supported the decision and that no part of the lien is for work upon property upon which a lien is not given by the statute. (*Sidlinger v. Kerkow*, 82 Cal. 42, 22 P. 932.)

So where the appeal is upon the judgment roll without a bill of exceptions, it must be presumed in support of the findings, that the evidence showed that the claimant of the lien received and furnished the portion of the materials in question under his contract with the owner of the building. (*Avery v. Clark*, 87 Cal. 621, 25 P. 919; see *Green v. Clifford*, 94 Cal. 49, 29 P. 331.)

So where there is nothing in the record to show that the land described in the decree in favor of the plaintiff directing the land to be sold, is greater in extent than that covered by the building, it will be presumed upon appeal in favor of the judgment, that it was not greater in extent, and the judgment will not be reserved because of the absence of an allegation and finding that it was necessary for the convenient use and occupation of the building. (*Sachse v. Auburn*, 95 Cal. 650, 30 P. 800; *Ward v. Crane*, 118 Cal. 676, 50 P. 839.)

**Appeals. Judgment not supported by evidence.
Conflict of evidence.**

Sec. 462. In an action of *indebitatus assumpsit*, to recover for work and labor done and materials furnished where the defendant pleads a special contract which he alleges the plaintiff failed to perform, if the findings show that the contract was subsequently complied with by the plaintiff, and that every technical failure of the plaintiff to comply with its strict letter was cured by the acts and consent of the parties, a judgment in favor of the defendants is not supported, and will be reversed upon appeal, and judgment will be ordered in favor of the plaintiff, upon the findings, for the balance due upon the contract. (*Griffith v. Happersberger*, 86 Cal. 605, 25 P. 187, 487.)

Where the evidence is not before the appellate court the findings of the trial court must be taken as true. (*Green v. Clifford*, 94 Cal. 49, 29 P. 331.)

General creditors of the contractor, who have themselves no liens upon the building and premises, cannot, upon an appeal from a money judgment rendered in their favor against the contractor, assail findings in favor of the validity of liens claimed by others. (*Kennedy-Shaw L. Co. v. Priet*, 113 Cal. 291, 45 P. 336.)

And other defendants appealing from a judgment foreclosing a mechanic's lien cannot object to the sufficiency of the form of judgment against the contractor, who does not appeal, and by which the appellants are not prejudiced. (*Western L. Co. v. Phillips*, 94 Cal. 54, 29 P. 328.)

Where there is a substantial conflict in the evidence, the findings of the trial court thereon will not be disturbed upon appeal. (*Harmon v. Railroad*, 105 Cal. 184, 38 P. 632; *Donohoe v. Mining Co.*, 113 Cal. 119, 45 P. 259; *Silvester v. Coe etc. Co.*, 80 Cal. 510, 22 P. 217.)

Appeal. First objection on.

Sec. 463. Matters which can be raised by demurrer to the pleadings in the court below, cannot for the first time be urged upon appeal. (*Russ L. Co. v. Garrettson*, 87 Cal. 589, 25 P. 747.)

But this rule does not apply to a defective cause of action. (*Harmon v. Ashmead*, 60 Cal. 439.)

Where there was evidence tending to show that the contract sued upon was filed in the recorder's office prior to the commencement of the work, there being no evidence to the contrary, and there was no special demurrer to the complaint, or objection to the contract when offered in evidence, it is too late to object on appeal for the first time that the plans and specifications referred to in the contract were not attached and made a part thereof, and that the contract in its entirety was not filed for record as required by the statute. (*White v. Fresno Natl. Bank*, 98 Cal. 166, 32 P. 979.)

And the same rule applies to the description of the property in the claim of lien and in the complaint based thereon. (*Coss v. MacDonough*, 111 Cal. 662, 44 P. 325.)

Appeal. What can be reviewed on.

Sec. 464. Where the part of the judgment directing the sale of the premises under the foreclosure is not expressly included in the notice of appeal, it cannot be reviewed upon an appeal from that part of the judgment respecting the validity and priority of liens enforced therein. (*Pacific etc. Co. v. Fisher*, 106 Cal. 224, 39 P. 758.)

Where judgment has been rendered in favor of the claimant foreclosing his lien, an order subsequently made allowing the claimant an attorney's fee is a special order made after final judgment, to be reviewed on a direct appeal therefrom, and cannot be reviewed on an appeal from the judgment as modified to conform to the order. (*Lumber Co. v. Neal*, 94 Cal. 192, 29 P. 622.)

Other defendants appealing from a judgment foreclosing a lien cannot object to the sufficiency of the form of judgment against the contractor, who does not appeal, and by which the appellants are not prejudiced. (*Lumber Co. v. Phillips*, 94 Cal. 54, 29 P. 328.)

Nor, in a like case, can general creditors of the contractor, who have no liens upon the property, assail the finding in favor of the validity of liens claimed by others. (*Lumber Co. v. Priet*, 113 Cal. 291, 45 P. 336.)

Appeal. Harmless errors.

Sec. 465. The overruling of a demurrer on the ground of uncertainty of allegation as to the character and extent of extra work alleged, is harmless, and not ground of reversal, where nothing is allowed or awarded in the decree on account of extra work. (*Wood v. Oakland etc. Co.*, 107 Cal. 500, 40 P. 806.)

Creditors of the contractor, who have no lien upon the building and premises, are entitled only to a money judgment against the contractor, and are not entitled to a judgment providing that the remainder of the fund due from the owner to the contractor, after the payment of liens, shall be distributed between them; but error in such judgment, being favorable to them, cannot be complained of upon their appeal from the judgment. (*Kennedy-Shaw L. Co. v. Priet*, 113 Cal. 291, 45 P. 336.)

The refusal of the court, at the trial, to permit an amendment to the answer, setting up the existence of an entire system of which the completed divisions of the canal formed a part, as presenting a new issue, upon which no evidence had been offered, is harmless, where the court subsequently allowed evidence upon that issue, which was considered in that court, and upon appeal. (*Pacific etc. Co. v. Bear Valley etc. Co.*, 120 Cal. 94, 52 P. 136.)

APPENDIX OF FORMS.

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APPENDIX OF FORMS.

Form No. 1.

BUILDING CONTRACT.

Articles of agreement, made this *15th* day of *February*, one thousand nine hundred, between *James First*, of the county of *Los Angeles*, state of California, the *party* of the first part (hereinafter designated in the singular number as owner) and *Harry Last*, of the *said* county of *Los Angeles*, state of California, the *party* of the second part (hereinafter designated in the singular number as contractor,) witnesseth:

First. The contractor agrees, within the space of *sixty* working days from and after *the 20th day of February, 1900*, to furnish the necessary labor and materials, including tools, implements and appliances required, and perform and complete in a workmanlike manner all the *work of constructing and erecting that certain two-story frame dwelling-house, and the trenches, cellar and foundation therefor*—and all other works shown and described in and by, and in conformity with the plans, drawings and specifications for the same made by *Isaac Hobbs*, (hereinafter designated in the singular number as architect,) the authorized architect employed by the owner, and which are signed by the parties hereto, *attached to, and made a part of this agreement and which are and shall be deemed originals and not copies.* [See note 4.]

1. This form of contract is one in general use and is sufficient as a guide. The stipulations of paragraphs sixth to thirteenth inclusive are not essential to the validity of the contract, but they make provision for contingencies which are constantly arising, and while they may be modified to meet the wishes of the parties, they should not be entirely disregarded.

2. Where the contract price exceeds one thousand dollars, the pro-

Second. The said work shall be done and the materials furnished in accordance with said plans, drawings, and specifications, and under the direction and supervision and subject to the approval of said architect, or a superintendent selected by said owner, within a fair and equitable construction of the true intent and meaning of said plans and specifications. [See note 3.]

Third. The time during which the contractor is delayed in said work by the acts or neglect of the owner or his employees, or those under him by contract or otherwise, or by the acts of God which the contractor could not have reasonably foreseen and provided for, or by stormy and inclement weather which delays the work, or by any strikes or like trouble among mechanics or laborers which delay said work, and which are not caused by, or the continuance of which is not due to, any unreasonable acts or conduct on the part of the contractor, shall be added to the time for completion as aforesaid.

visions of sections 1183 and 1184 of the C.C.P. must be observed. Section 1183 requires such contracts to be in writing, subscribed by the parties, and the contract or a memorandum thereof to be filed for record in the office of the county recorder of the county, or city and county, where the property is situated, before the commencement of the work thereunder. (See chap. VIII, sec. 145 *et seq.*)

Section 1184 requires the price of such contracts, by their terms, to be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided that at least twenty-five per cent. of the whole price shall be made payable at least thirty-five days after the completion of the contract. (See chap. VIII, sec. 166 *et seq.*)

In the preparation of the contract the practitioner should not trust entirely to the form. The provisions of sections 1183 and 1184 should be carefully read, and when the contract is finally drafted, it should be tested by the statute and the decisions of the court, which will be found at the references above given, to see whether every essential requirement of the statute has been complied with.

Under the lien law of this state the only safeguard of the contracting-owner, where the price of his contract exceeds one thousand dollars, is a valid original contract without which his property may be subjected to the liens of all persons, except the contractor, for the value of all labor performed and materials furnished. The non-observance of the provi-

Fourth. Said building and works shall be erected and constructed upon a lot or parcel of land situated in *city of Los Angeles*, said county of *Los Angeles*, state of California, and described as follows:

[Insert Description.]

Fifth. The owner agrees, in consideration of the performance of this agreement by the contractor, to pay, or cause to be paid, to the contractor, his legal representatives or assigns, the sum of *four thousand* dollars in United States gold coin, at the times and in the manner following, to wit:

One thousand dollars when excavating, trenches, cellar, and foundation shall be completed and first floor joists laid.

One thousand dollars when roof shall be on and building enclosed.

One thousand dollars when the said building and all of said works shall be finally completed; and

One thousand dollars thirty-five days after the final completion of this contract. [See note 2.]

ions of the statute in these respects has given rise to a large part of the litigation upon this branch of the law.

3. The following is an abridgment of the notes upon this form by Sheldon Borden, Esq., of the Los Angeles bar:

Paragraph eleventh dispenses with any insurance clause, but it will frequently be found that this clause conflicts with the general conditions in forms of specifications used by architects by which it is provided that the contracting-owner shall keep the building insured, etc. There should be nothing in the specifications relating to insurance; if an insurance clause is desired, it should be substituted for paragraph eleventh of the form of contract.

This form of contract applies only to buildings. There are many other kinds of work, such as constructing reservoirs, pavements, pipe lines, sinking wells, etc., where the work is paid for by the foot or yard. In contracts for work of this kind, the terms and time of payment, of course, differ from those given in this form. In the preparation of contracts other than for buildings this form may be used as a guide, but care must be taken to eliminate every provision not applicable to the particular work to be provided for.

When contracts for alterations, additions or repairs are prepared, care should be taken to avoid any provisions whereby the old materials might be construed as part of the price or consideration for the work.

4. Under paragraph first of this form, it is essential to the validity of the contract that the plans, drawings and specifications be signed by the parties, attached to and filed with the contract. (See chap. VIII, secs. 153, 154.)

Provided, that when each payment or installment shall become due, and on the final completion of the work, certificates in writing shall be obtained from the said architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates under his hand to the contractor, or, in lieu of such certificates, shall deliver to the contractor, in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates, or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand made by him for the certificate, shall, at the expiration of said three days, become due and payable, and the owner shall be liable and bound to pay the same on demand.

In case the architect delivers the writing aforesaid in lieu of the certificate, then a compliance by the contractor with the requirements of said writing shall entitle the contractor to the certificate.

Sixth. For any delay on the part of the owner in making any of the payments or installments provided for in this contract after they shall become due and payable, he shall be liable to the contractor for any and all damages which the latter may suffer; and such delay shall, in addition, operate as an additional extension of the time for completion aforesaid for the length of time of such delay.

Seventh. The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications, or *vice versa*, are to be executed the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together. But no part of said specifications that is in conflict with any portion of this agreement, or that is not actually descriptive of the work to be done thereunder, or of the manner in which the said work is to be executed, shall be considered as any part of this agreement, but shall be utterly null and void.

Eighth. Should the owner at any time during the progress of the work, request any alterations or deviations in, additions to, or omissions from, this contract or the plans or specifications, he shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to, or deducted from, the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature or extent thereof; provided, however, that the character and valuation of any or all changes, omissions, or extra work, shall be agreed upon and fixed in writing, and signed by the owner and the contractor, prior to the commencement of the work of making such alterations, deviations, additions or omissions.

Ninth. Should any dispute arise between the owner and contractor, or between the contractor and architect, respecting the true construction of the drawings or specifications, the same shall be decided by the architect, whose decision shall be binding on all parties.

Tenth. Should the contractor fail to complete this contract, and the works provided for therein, within the time fixed for such completion, due allowance being made for the contingencies provided for herein, he shall become liable to the owner for all loss and damages which the latter may suffer on account thereof; but not to exceed the sum of \$25.00 per day for each day said works shall remain uncompleted beyond such time for completion.

Eleventh. In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake or other act of God which the contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of this contract; and the loss occasioned thereby, and to be sustained by the contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract.

In the event of a partial destruction of said work by any of the causes above named, then the loss to be sustained by the owner shall be in the proportion that the amounts of installments paid or due bears to the total amount of work done and materials furnished, estimated according to said contract price, and the balance of said loss shall be sustained by the contractor. [Note 3.]

Twelfth. The payment of the progress payments by the owner shall not be construed as an absolute acceptance of the work done up to the time of such payments; but the entire work shall be subject to inspection and approval of the architect or superintendent at the time when it shall be

claimed by the contractor that the contract and works are completed; but the architect or superintendent shall exercise all reasonable diligence in the discovery, and report to the contractor, as the work progresses, of materials and labor which are not satisfactory to the architect or superintendent, so as to avoid unnecessary trouble and cost to the contractor in making good defective parts.

Thirteenth. Should the contractor, at any time during the progress of the work, refuse or neglect, without the fault of the owner, architect or superintendent, to supply a sufficiency of materials or workmen to complete the contract within the time limited herein, or any lawful extension thereof, for a period of more than three days after having been notified by the owner in writing to furnish the same, the owner shall have power to furnish and provide said materials or workmen to finish the said work; and the reasonable expenses thereof shall be deducted from the amount of the contract price; such notice may be served personally or by mailing the same addressed to the last known place of residence of the contractor.

In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

James First, [SEAL]

Harry Last. [SEAL]

Form No. 2.**MEMORANDUM OF CONTRACT. (Section 1183.)**

Memorandum of that certain contract made the *15th* day of *February, 1900*, between *James First*, the owner and party of the first part therein, and *Harry Last*, the contractor and party of the second part therein (being all of the parties to said contract), for the construction by said contractor for said owner of a two-story frame dwelling house of ten rooms, with brick chimneys and foundation, and shingle roof, and the trenches, cellar and foundation therefor, upon that certain lot or parcel of land situated in the——county of *Los Angeles*, state of California, and described as follows, to wit:

[Insert Description.]

Under the said contract the said contractor is also required to paint the said building inside and out; to furnish all necessary wires and fixtures and do all the work of wiring said building for electric light; to furnish all necessary gas pipes and fixtures and do all the work of putting the same in said building; to furnish and put in hot water heater and all connections necessary to heat said building; and to furnish and put in all necessary water pipes, both

The memorandum is not required to be signed (*Joost v. Sullivan*, 111 Cal. 294, 43 P. 896), but the practice is to sign it.

What is a sufficient statement in the memorandum of the general character of the work to be done will always be involved in uncertainty except where the description of the work as set forth in the specifications is copied into the memorandum. As the plans usually constitute an important part of the description, it is necessary to frame a description within the brief scope of a memorandum which will give the substance of what the plans disclose. Frequently the dimensions of the building are not shown except in the plans. The form of memorandum above given would seem to be sufficient as a memorandum of the form contract No. 1, under the decision in *Joost v. Sullivan*, *supra*, but it is a much safer practice to file the original contract.

for hot and cold water, throughout said building. The extreme length of the building from front to back, exclusive of porches, is 60 feet, and its extreme width, exclusive of porches, 40 feet.

The contract price, or the total amount to be paid under said contract for said *work* and said *materials*, is the sum of *four thousand dollars*, which will become due and payable as follows, to wit:

\$1000 when excavating, trenches, cellar and foundation shall be completed and first floor joists laid.

\$1000 when roof shall be on and building enclosed.

\$1000 when the said building and all of said works shall be finally completed.

\$1000 thirty-five days after the final completion of said contract.

Dated Los Angeles, California, February 15th, 1900.

James First.

Form No. 3.**BOND REQUIRED BY SECTION 1203. C. C. P.**

Know all men by these presents: That we, *Harry Last of the county of Los Angeles*, state of California, as principal, and *Paul Jones and John Smith, of the same place*, as sureties, are held and firmly bound unto the state of California, and to any and all persons who perform labor for, or furnish materials, or both, to said *Harry Last*, the contractor and party of the second part, named in the building contract hereinafter mentioned, or any person acting for *him*, or by *his* authority, in the sum of *one thousand dollars*, lawful money of the United States, which said sum is an amount equal to at least twenty-five per cent. of the contract price of said contract, to be paid to said persons performing labor or furnishing materials, or both, or to any of them, their heirs, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the *15th* day of *February*, in the year *A. D.* one thousand *nine hundred*.

Whereas, a certain building contract which (*or a memorandum of which, as the fact may be*) is filed herewith in the office of the county recorder of *Los Angeles county*, state of California, was, *at the date hereof*, made and executed by *James First of the city of Los Angeles, said county*, as owner and party of the first part therein, and *said Harry Last* as

contractor and party of the second part therein, for the construction of a two-story frame dwelling house, and the other works therein described, for the contract price of \$4000, upon the parcel of land described in said contract.

Now, therefore, the condition of the above obligation is such that if the said *Harry Last*, the said *contractor*, shall duly pay to said person or persons performing labor for, or furnishing materials to, *him, the said contractor*, or any person acting for *him*, or by *his* authority, in the *construction* of the said *building and works*, under the said contract, the value of such labor or materials, or both, and shall well and faithfully perform *his* said contract, and deliver said building to the above named *James First, owner*, within the contract time for completion, free from all liens, demands or claims, and shall hold harmless the said *James First*, then the above obligation shall be null and void, otherwise it shall remain in full force and effect.

Harry Last. [SEAL]

Paul Jones. [SEAL]

John Smith. [SEAL]

Signed, sealed and delivered in the presence of *Isaac Jenks.*
 State of California, }
 County of *Los Angeles.* } ss.

Paul Jones and *John Smith*, the sureties whose names are subscribed to the foregoing bond, being severally duly sworn, each for himself deposes and says, that he is a resident and *freeholder* within the state of California, and is worth the sum specified in said bond, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

Paul Jones.

John Smith.

Subscribed and sworn to before me this *15th* day of *February, 1900.*

Richard Harding.

[NOTARIAL SEAL]

Notary Public in and for said County.

Form No. 4.

COMMON LAW BOND.

Know all men by these presents, that we, *Harry Last* of the county of *Los Angeles*, State of California, as principal and *Paul Jones* and *John Smith* of the same place, as sureties, are held and firmly bound unto *James First*, of said county in the sum of *two thousand dollars*, lawful money of the United States, to be paid to the said *James First*, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the *15th* day of *February*, in the year *A. D. one thousand nine hundred*.

Whereas, on the *15th* day of *February*, *1900*, the said *Harry Last* entered into a contract in writing with the said *James First*, of even date herewith, whereby for the consideration of the sum of *four thousand dollars*, the said *Harry Last* covenanted and agreed to *build, construct and finish a certain two-story frame dwelling house* and other works for the said *James First* in accordance with the *stipulations and terms of said contract and of the plans, drawings and specifications attached to and made a part thereof which said contract and said plans, drawings and specifications were, on the said 15th day of February, 1900, duly filed for record in the*

The above form is adopted from the bond in *Kiessig v. Allspaugh*, 91 Cal. 234, 27 P. 662. See sec. 209, *supra*, as to validity of bond when the original contract is void.

office of the county recorder of said Los Angeles county and all of which are hereby made a part thereof;

Now, therefore, the condition of the above obligation is such that whether the said contract is valid, in violation of the statute or void, if the above bounden *Harry Last* shall well and truly save harmless and indemnify the said *James First* from and against any and all claims, demands, or liens whatsoever, for materials furnished for and used in, and for labor performed and furnished upon and in the construction of said *building and works*, then this obligation to be void, otherwise to remain in full force and effect.

Harry Last, [SEAL]

Paul Jones, [SEAL]

John Smith. [SEAL]

Signed, sealed and delivered in the presence of *Abel Stearns*.

Form No. 5.**CLAIM OF LIEN. GENERAL FORM. (Section 1187.)**

Notice is hereby given that — of the county of — state of California, under and pursuant to the law of said state relative to liens of mechanics and others upon real property, *claims* a lien upon the *lot* or *parcel* of land situated in the county of —, state of California, and upon the — [Note 1] — building (*or structure or improvement, as the fact may be*), thereon, which land is described as follows, to wit:

[Insert description. Note 2.]

Said lien is claimed for — [Note 3] — the construction (*or alteration, addition or repair, as the fact may be,*) of the said building (*or structure or improvement as the fact may be*), between the — day of — 190— and the — day of — 190—, in pursuance of a contract made by said claimant with — [Note 4] — on or about the — day of —, 190—, the terms, time given and conditions of which contract are as follows, to wit:

[Insert terms, etc. of contract. See note 5.]

That — [Note 6] — and the amount due said claimant

1. The statute requires the claim of lien to contain a "description of the property," to be charged with the lien. This, of course, includes both the building or other structure and the land. In most cases the description of the land will identify the building, but it might happen that upon the same parcel of land, there are several buildings and, in such case, the particular land upon which the building is situated must be set forth in the claim, or a particular description of the building given.

2. The description must be sufficient to identify the property. See secs. 239-242, *supra*, as to what is sufficient description.

and unpaid on account thereof, after deducting all just credits and offsets, is the sum of — dollars.

That — is the — [Note 7] — owner of said building (or structure or improvement), and — is the — [Note 7] — owner of said land. [Note 8.]

State of California, } ss.
County of — }

being duly sworn, say— that —he— the claimant named in the foregoing claim of lien and that the statements therein contained are true.

Subscribed and sworn to before me this — day of — 190—.

[NOTARIAL SEAL]

Notary Public in and for said county.

3. If the lien-claimant is a laborer, the statement should here be: "labor performed by said claimant upon the employment and at the request of Harry Last (contractor, or James First, owner, as the fact may be), upon and in" * * *

If a materialman, "materials furnished by said claimant to Harry Last (contractor, or James First, owner, as the fact may be) for" * * *

If an original contractor, "work, labor and materials done and furnished by said claimant upon the employment and at the request of and to James First (owner) upon, for and in" * * *

If a subcontractor, the statement should be substantially in the form last given changing the name of the owner to that of the original contractor.

4. The name of the person here required to be stated is of that person with whom the claimant has contractual relations. If the claimant was employed by, or furnished materials to, the original contractor or his subcontractor, the name of the original contractor or of the subcontractor must be stated as the fact may be.

On the other hand, if the claimant was employed by or furnished materials directly to the owner under direct contract with him, the name of the owner should be stated.

The statute requires a statement which shows whether the claimant contracted personally with the owner or with the contractor, subcontractor, or other person mentioned in section 1187. (See secs. 227, 229, *supra*.)

5. No set form of statement of the terms, time given and conditions of the claimant's contract can be given. It is seldom that the terms of different contracts are the same, and it may safely be assumed that the form of statement of one contract is insufficient as a statement of any other. It is, therefore, suggested to the practitioner who is not familiar

with the technicalities of this branch of the law, to read carefully sections 231-238, *supra*, where this subject is fully treated.

It must not be assumed that the statements of the terms, etc., of the contract given in forms 6 and 7 may be used indiscriminately for all contracts.

The kind of labor performed and the kind or character of materials furnished must be stated. (See secs. 213-215, *supra*.)

The safest rule to follow, in setting forth the terms, etc., of the contract is to state the facts. This, of course, presupposes that the express terms of the contract have been carefully and accurately ascertained. If, for instance, the only express term of the contract is a request to perform labor, the amount of compensation, or the price, and the time of payment thereof, are not required to be stated in the claim. (See sec. 234, *supra*.)

6. Where the price of the labor or of the materials has been expressly agreed upon, it will, of course, be stated as a part of the terms, etc., of the contract. But if no price has been expressly agreed upon, then the law determines the value. But in either case the amount claimed to be due should be stated. (See secs. 214-218, *supra*.) The statement here, therefore, should be, "That the contract price of said labor (or materials, or both), is the sum of dollars." Or, "that the value" etc. is the sum of dollars.

7. The statement here should be according to the facts. If the same person is both the real and reputed owner it may be so stated. The statute, however, does not require both. If the name of the owner, or reputed owner is not known, it cannot, of course, be stated, but in such case a statement should be made in the claim that the name is unknown to the claimant. (See sec. 221, *supra*.) The name of the person who is the "owner or the reputed owner" at the time of filing the claim, must be stated. (See sec. 220, *supra*.)

As to what statements are sufficient, see sec. 222 *et seq.*, *supra*.

8. Great care should be taken in the preparation of the claim of lien. It is upon the claim as prepared and filed that the lien-claimant must stand or fall for his right to enforce his lien.

In view of the fact that without a valid claim no lien can arise, and that its preparation requires the exercise of care and caution, it has been thought proper to offer the following suggestions abridged from a paper by Hon. D. K. Trask of the Superior Court of Los Angeles county:

a. The facts upon which the right to a lien must be based are unchangeably fixed. Hence, if these facts are misstated in the claim, there will be a variance between the claim and the evidence; and since the claim cannot be amended or reformed, this variance, if material, will be fatal to the lien.

In the preparation of the claim, therefore, all the essential facts relating to the transaction or to the contract to be set forth in the claim, should be accurately ascertained and then stated as facts as they will be proved by the evidence upon the trial. After the claim has been prepared it should be carefully compared with the evidence to see whether its statements vary at all from the evidence which will be introduced upon the trial to prove the facts as stated in the claim.

b. Every statement required by the statute must be set forth in the claim.

The practitioner should not trust entirely to forms. Forms are useful outlines, but, however carefully prepared and annotated, they should not be wholly relied upon as sufficient in every case. The claim as prepared should always, therefore, be carefully compared with the statute itself to see whether every statement required by the statute has been set forth in the claim. Nor should the decisions of the court be overlooked. They often furnish precedents which may be safely followed and which should never be disregarded.

Form No. 6.

CLAIM OF LIEN FOR MATERIALS. (Section 1187.)

Notice is hereby given that *Richard Davis, of the county of Los Angeles, state of California*, under and pursuant to the law of said state relative to liens of mechanics and others upon real property, *claims* a lien upon the lot or parcel of land situated in the *city of Los Angeles, said county and state* and upon the *two-story frame dwelling-house thereon*, which land is described as follows, to wit:

Lot numbered two in block numbered four of the Merry tract as designated and delineated upon a map of said tract recorded in the office of the county recorder of said county, in book 777 of miscellaneous records at page 333.

Said lien is claimed for materials furnished by said claimant to *Harry Last* between the *20th* day of *February, 1900*, and the *30th* day of *March, 1900*, for the construction of said *building*, in pursuance of a contract made by said claimant with the said *Harry Last* therefor, on or about the *16th* day of *February, 1900*, the terms, time given and conditions of which contract are as follows, to wit:

The claimant agreed to furnish to said Last from time to time as called for or ordered, lumber for use in the construction of said building and the said Last agreed to pay for the same the ruling market price thereof, on demand.

That the value of said materials according to said market price is five hundred dollars, and the amount due the claimant and unpaid on account thereof, after deducting all just credits and offsets, is the sum of four hundred dollars.

That *James First* is the reputed owner of said building and of said land.

Richard Davis.

Form No. 7.**CLAIM OF LIEN FOR LABOR. (Section 1187.)**

Notice is hereby given that *Volney Burch of the county of Los Angeles, state of California*, under and pursuant to the law of said state relative to liens of mechanics and others upon real property, *claims* a lien upon the lot or parcel of land situated in the *city of Los Angeles, said county and state*, and upon the *two-story frame dwelling-house thereon*, which land is described as follows, to wit:

[Description.]

Said lien is claimed for labor performed by said claimant upon the employment and at the request of *Harry Last* between the *17th day of February, 1900*, and the *30th day of March, 1900*, upon and in the *construction of said building*, in pursuance of a contract made by the claimant with said *Harry Last* therefor on or about the *16th day of February, 1900*, the terms, time given and conditions of which contract are as follows, to wit:

Said claimant agreed to perform labor as a carpenter upon and in the construction of said building and the said Harry Last agreed to pay him therefor the sum of \$3.00 per day. No time of payment was agreed upon.

That said claimant *performed twenty days of labor*, and the amount due claimant and unpaid on account thereof, after deducting all just credits and offsets, is the sum of *twenty-five* dollars.

That *James First* is the owner of said *building* and of said *land*.

Volney Burch.

[Verification as in form No. 5.]

Form No. 8.**CLAIM OF LIEN. ANOTHER GENERAL FORM. (Section 1187.)**

[The form of claim of lien No. 5, was prepared by Judge Shaw of the Superior Court of Los Angeles county. It will be observed that this form eliminates some of the statements contained in the older forms. It is believed, however, that it contains every statement required by the statute and that notwithstanding its brevity, it furnishes a safe guide for the practitioner. The statements in this form are not in the language of the statute, nor, in giving them, has the order of the statute been followed. The following form follows the language, and the order of statement, of the statute and has been inserted for use by those who prefer this mode of statement.]

Notice is hereby given, that — [name of claimant] of the — county of —, state of — California — [See note 1 to this form] the construction [or alteration, addition to, or repair, as the fact may be] of that certain building [or structure or improvement as the fact may be] now situate upon that certain lot or parcel of land in the — county of — state of California, hereby sought to be charged with this lien, and described as follows, to wit:

[Insert description sufficient for identification. See secs. 239-242, supra, as to what is sufficient description.]

Note 1. If the claimant is a laborer, the statement should here be: "Has performed — days of labor as a mason [or as a carpenter, or otherwise as the fact may be, showing the kind of labor performed] between — [giving dates] upon and in" —

If the claimant is a materialman, the statement should here be: "Has, between — [giving dates] furnished lumber — [or other material, stating the kind] — for," —

If the claimant is an original contractor, the statement here should be: "As an original contractor, between the — [giving dates] has furnished labor and materials [stating the kind of labor and materials] — for upon and in," —

If the claimant is a subcontractor, the statement here should be the same as that of the original contractor, changing only "original" to "sub."

That the name of the — owner of said building (or structure or improvement, as the fact may be) is — [See Note 7, to Form No. 5.]

That the name of the — owner of said land is — [See Note 7, to Form No. 5.] —

That the name of the person by whom said — (claimant) — was employed to perform said labor is — [See Note 4, to Form No. 5.] —

(If the claimant is materialman, then the statement should be:)

That the name of the person to whom said — (claimant) — furnished said materials is — [See Note 4, to Form No. 5.] —

(If the claimant is an original contractor, or subcontractor, then the statement should be:)

That the name of the person by whom said — (claimant) — was employed to perform and to furnish said labor, and to whom he furnished said materials, is — [See Note 4 to Form No. 5.]

That the following is a statement of the terms, time given and conditions of the contract of said — (claimant) — with said —, entered into on or about the — 1900, under and in pursuance of which the — (said labor was per-

Note 2. The statute does not require a statement in the claim of lien of the "value" except in those cases where the price or value has been agreed upon. (*Jewell v. McKay*, 82 Cal. 144, 23 P. 139.) But in this case it is said that the claim must show the amount due and owing on the demand. The claim, it is believed, ought to show in some way the amount which is claimed. If the price has not been expressly agreed upon, and therefore, not set forth in the claim, and if the value is not stated therein, then certainly the "demand" should be so stated that the value may be ascertained. But it has been held that the items of the account or demand need not be set forth in the claim. (Secs. 253-4, *supra*.) It is believed, therefore, that the rule in this respect is that which obtains in pleading and which permits the averment of the value in an action to recover for labor done and materials furnished under an implied contract. (*See Brigham v. Knox*, 59 P. 198.)

Note 3. Where a claim includes both labor and materials and a separate price has been agreed upon for each, the price of each must be stated. (*See sec. 214, supra.*)

formed; or the said materials were furnished; or the said labor was performed and the said materials were furnished,—as the fact may be,) to wit: — [See note 5, to Form No. 5.]

That the — (contract price, or the value, where the price has not been agreed upon, of said labor, or of said materials, or said labor and materials, as the fact may be — [See Note 2, to this form,] is the sum of — Dollars. [See Note 3 to this form.]

That — has been paid on account thereof, and that the sum of—dollars is still due, owing and unpaid thereon to said— (*claimant*)—after deducting all just credits and offsets.

Wherefore, the said — (*claimant*) — claims a lien upon the said — building (*or structure or improvement, as the fact may be,*) and also upon the land upon which the same is situated together with a convenient space about the same, or so much as may be required for the convenient use and occupation of the same, under and pursuant to the law of said state relative to liens of mechanics and others upon real property. [See Note 8 to form No. 5.]

Claimant.

Form No. 9.

NOTICE TO OWNER UNDER SECTION 1184.

To ———— reputed owner.

You will take notice that the undersigned has furnished (or performed or has agreed to perform or furnish)—— (state the kind of labor or materials, or both, performed or furnished, or agreed to be performed or furnished) —— to (or for) —— (state the name of the person for whom the labor was performed or agreed to be performed, or to whom the materials were furnished or agreed to be furnished) —— the construction (or alteration, addition, or repair, as the fact may be) of that certain —— building (or structure or improvement, as the fact may be), erected (or to be erected or repaired, etc.) by said —— for you upon that certain lot or parcel of land situated in the——county of——state of California, and described as follows, to wit:

[Insert description.]

That the amount in value of said —— performed (or furnished, in case of materials), is the sum of —— dollars, and that the amount in value of the whole —— agreed to be performed (or furnished) is the sum of —— dollars.

You are, therefore, notified to withhold from the said —— (owner) —— sufficient money due or that may become due to him to answer the said claim and any lien that may be filed therefor pursuant to the provisions of the mechanics' lien law of the state of California.

Dated——, California,
——190——.

Form No. 10.

NOTICE BY OWNER OF COMPLETION OR OF CESSATION.

(Section 1187.)

To whom it may concern :

Notice is hereby given that the undersigned *is now, and was, at the date of the contract hereinafter mentioned, the owner in fee simple* [or "*of an estate for years,*" or *otherwise as the fact may be*], of that certain lot or parcel of land situated in the — county of *Los Angeles*, state of *California*, and described as follows, to wit :

[Insert description.]

That as such owner, on the *15th* day of *February, 1900*, he entered into a contract *in writing* with *Harry Last* for the construction and erection upon said land of a *two-story frame dwelling house of ten rooms and for the furnishing of all labor and materials therefor*, and that the said undersigned *is the owner* of said building, and caused the same to be *constructed and erected*.

That the said building was actually completed on the *30th* day of *March, 1900*, [or *in case of cessation from labor, "that labor upon said building and under said contract actually ceased on the 28th day of February, 1900, and before the actual completion thereof.*]

James First.

Dated *Los Angeles, California, March 30th, 1900.*

State of California, }
 County of *Los Angeles*. } ss

James First being first duly sworn deposes and says that *he is* — the owner named in the foregoing notice and that the statements therein contained are true.

James First.

Subscribed and sworn to before me this *30th day of March, 1900.*

[NOTARIAL SEAL]

David Harum,
 Notary Public in and for said county.

Form No. 11.

NOTICE BY OWNER OF NON-RESPONSIBILITY. (Section 1192.)

To whom it may concern :

Notice is hereby given by the undersigned, that *he is the owner of that certain lot or parcel of land [or of an estate or interest therein, stating it,]* situated in the — county of —, state of California, and described as follows, to wit :

[Insert description.]

and that *he* will not be responsible to any person or persons for the construction or erection of any building, structure or improvement now being constructed or erected or hereafter to be constructed or erected thereon, or for the alteration, addition to, or repair of any building, structure or improvement now on said premises or that may hereafter be on said premises, and hereby *disclaims* having authorized or contracted for any of said work or for any materials or labor furnished or to be furnished therefor by any person whatsoever.

This notice is given pursuant to the provisions of section 1192 of the mechanics' lien law of the state of California.

Dated — California, — 190 —.

Form No. 12.**COMPLAINT FOR FORECLOSURE OF LIEN.**

In the Superior Court of the county of *Los Angeles*, state of California.

<p><i>The Golden State Lumber Company,</i> a corporation,</p>	}	Complaint.
Plaintiff,		
<i>vs.</i>		
<p><i>E. J. Jenicki, Wm. Raynard, John Doe, Richard Roe, Geo. Green and Mary Black,</i></p>	}	
Defendants.		

Now comes the above named *plaintiff* and for cause of action against the above named *defendants*, alleges:

I.

That the plaintiff The Golden State Lumber Company, is and was at all the times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the state of California.

II.

That the defendant E. J. Jenicki is and was at all the times herein mentioned, the owner and reputed owner of that certain piece and parcel of land situate in the city of Los Angeles, county of Los Angeles, state of California, and more particularly described as follows, to wit:

The west 108 feet of the north 315 feet of lot No. 15 of the Goodner and O'Melveny tract, situate on Goodner street, according as the said lot is numbered, platted, delineated and shown upon a map of said tract, recorded in book 4, page 139 of miscellaneous records of said Los Angeles county.

III.

That on the 4th day of August, 1899, said defendant E. J. Jenicki, as the owner and reputed owner of said premises entered into a contract with said defendant Wm. Raynard, for the erection and construction of a one story dwelling-house upon the real property hereinbefore described under and by which said defendant Wm. Raynard agreed to furnish material and labor and to construct said dwelling for the sum of \$1875.00.

Said contract was in writing, subscribed by the said parties thereto, and was filed in the office of the county recorder of Los Angeles county, before the work on said dwelling commenced.

IV.

That on or about the 17th day of August, 1899, said defendant Wm. Raynard as such contractor, entered into a contract with plaintiff under and by which said plaintiff agreed to furnish certain lumber rough and surfaced, and building materials necessary to be used in the erection and construction of said dwelling, and the following is a statement of the terms, time given and conditions of said contract: said plaintiff agreed with said contractor Wm. Raynard to furnish said lumber and building materials from time to time as ordered, for a price reckoned on the basis of \$20.00 per thousand feet for dimension pine, including drayage to the place where the said material was to be used, and the said Wm. Raynard agreed to pay therefor the said price in gold coin of the United States as follows:

\$150.00 when the first payment was to be paid to said contractor by the owner under the terms of a certain contract entered into between the said owner and contractor, to wit, when the rafters were on said dwelling;

\$100.00 when he received the second payment provided to be paid by said contract, to wit, when the building was enclosed;

\$150.00 when he received the third payment provided for in said contract, to wit, when the said building was completed, and the balance when the said contractor received his final payment.

V.

That in pursuance of said contract *plaintiff* did, between the 17th day of August, 1899, and the 10th day of October, 1899, furnish and deliver said materials unto said defendant Wm. Raynard.

That said materials are and were of the value at the prices aforesaid, of \$516.92 in gold coin of the United States.

That all of the said materials were furnished to be used and were actually used in the erection and construction of said dwelling.

VI.

That the sum of \$200.00 and no more, has been paid on account of said materials so furnished as aforesaid, and that the sum of \$316.92 is still due, owing and unpaid on said account to plaintiff, after deducting all just credits and offsets.

VII.

That in pursuance of the terms of said contract between the defendant E. J. Jenicki and defendant Wm. Raynard, said defendant Wm. Raynard proceeded to the erection and construction of said dwelling upon said premises and continued to work thereon until the same was completed and the work thereon finished.

VIII.

Plaintiff is informed and believes and upon such information and belief alleges, that at the time of filing the claim of lien as hereinafter alleged, there was due and unpaid and that there is still due and unpaid the sum of \$475 from said defendant E. J. Jenicki to said contractor, Wm. Raynard on account of said contract price, and applicable to the liens of *plaintiff* herein referred to and of any other claimants who performed labor for or furnished materials in, about or upon the erection and construction of said dwelling.

IX.

That the said *defendant E. J. Jenicki* as such owner, filed for record in the office of the county recorder of *Los Angeles* county, on the *24th* day of *November, 1899*, a notice of the completion of said *building*, in accordance with the terms of said contract, on the *9th* day of *November 1899*.

That the whole of the lot hereinbefore described is necessary for the convenient use and occupation of said dwelling.

X.

That on the *1st* day of *December 1899*, and within *30* days from and after the filing of said notice of completion, as hereinbefore set forth, *plaintiff* for the purpose of securing and perfecting a lien for money so due *it* as aforesaid, upon the *building* and land hereinbefore described, and under the provisions of chapter II, title IV, part III, of the Code of Civil Procedure of the state of California, filed for record in the office of the county recorder of *Los Angeles* county, that being the county in which said land is situated, *its* claim of lien, duly verified by the oath of *L. R. Winans, the general agent of said corporation*, which claim contained the following statements, to wit:

(a) A statement of *plaintiff's* demand after deducting all just credits and offsets setting forth *its* claim of lien for the materials so furnished for and actually used in the erection and construction of said building, amounting to the sum of \$516.92, with a credit thereon of \$200.00, leaving a balance due *plaintiff* of \$316.92.

(b) The name of the *owner and reputed owner* of said premises and building, to wit, the name of *E. J. Jenicki*.

(c) The name of the person with whom *plaintiff* agreed to furnish and to whom *it* did furnish said materials for use in said *building*, as aforesaid, to wit, said *Wm. Raynard*.

(d) The terms, time given and conditions of *plaintiff's* said agreement with said *defendant Wm. Raynard*, to wit, the terms, time given and conditions hereinbefore set forth in paragraph IV of this complaint.

(e) A description of the property sought to be charged with its lien sufficient for identification, to wit, the real property *and building* hereinbefore described.

That said claim was on the *first* day of *December, 1899*, duly recorded by the county recorder of *Los Angeles* county, according so law.

That *plaintiff* paid for verifying and recording said lien, the sum of *\$1.95*.

That *\$100.00* is a reasonable attorney's fee to be allowed plaintiff for the foreclosure of said lien and the prosecution of this action in the Superior Court.

XI.

That the defendants *John Doe, Richard Roe, Geo. Green and Mary Black*, are herein sued by fictitious names, as their true names are unknown to plaintiff, and when the same are discovered plaintiff asks leave to insert the true names of defendants herein.

Plaintiff is informed and believes, and on such information and belief alleges, that the said *defendants, John Doe, Richard Roe, Geo. Green and Mary Black*, claim some interest in said premises or building, either as owners, judgment creditors, lien holders or otherwise, and that any such claims are subsequent to and subject to *plaintiff's* claim of lien sued upon herein.

WHEREFORE *plaintiff* prays judgment against said *defendant Wm. Raynard* for the sum of *\$461.72* in U. S. gold coin, and the cost of verifying and recording said lien, to wit, the sum of *\$1.95*, and for the reasonable attorney's fee for

foreclosing said lien, to wit, the sum of \$100 and the costs of this action; and that the same be adjudged a lien upon the real property and the said *building thereon* hereinbefore described, and upon the interest of *all the defendants* herein, and a prior lien to that of the said *defendants and all of them*.

That said lands and premises and appurtenances thereunto belonging be adjudged and decreed to be sold by the sheriff of *Los Angeles* county, according to law and the practice of this court. That the proceeds of said sale be applied as follows: To the payment of the costs of sale and of this action, and any judgment that may be recovered by the *plaintiff* herein; and that *it* may have judgment and execution against said *defendant Wm. Raynard* for any deficiency which may remain after applying all the proceeds of the sale of said property and premises, properly applicable to the satisfaction of said judgment.

That the *plaintiff* may be a purchaser at such sale, and that the sheriff execute a deed to the purchaser; that said purchaser be let into the possession of such premises on production of the sheriff's deed therefor, and for general relief.

Sheldon Borden,
Attorney for Plaintiff.

[Verification, if desired.]

THE COMPLAINT. AVERMENT OF NOTICE AND KNOWLEDGE
UNDER SECTION 1192 C.C.P.

1. Where the building was erected at the instance of a tenant, a vendee under an executory contract, or some person not owning the land in fee-simple, and the lien is claimed upon the entire property and the interest of all persons therein, under the provisions of section 1192, C.C.P., the complaint should contain allegations showing that the rule established by said section is applicable. In such case the following is suggested as an amendment to paragraph II of the form of complaint:

That the defendant—is, and was at all the times herein mentioned, the owner of the real property hereinafter described, and the defendant *E. J. Jenicki* is, and was at all the times herein mentioned, the reputed owner thereof;

[Here follows description of realty.]

Plaintiff is informed and believes, and on such information and belief alleges that the title of said defendant *Jenicki* in and to said real property is, and was at all the times herein mentioned, that of a purchaser under an executory contract of sale from the defendant—; that said defendant—at the time of the execution of the said contract between the defendant *Jenicki* and the defendant *Raynard* had knowledge of the intended construction of the said building, and at the time of the commencement of the erection and construction thereof, and at all times thereafter, said defendant—had notice and knowledge of the erection and construction of said building; that said defendant—did not within three days after having obtained knowledge of such intended construction, or of such construction, or at any time, or at all, give notice that he would not be responsible

for the construction of said building, either by posting a notice in writing to that effect, in some conspicuous place upon said land, or upon the said building, or otherwise, or at all.

THE COMPLAINT. AVERMENT OF NOTICE UNDER SECTION
1184 C.C.P.

2. Where the lien-claimant relies upon a notice given under the provisions of section 1184, C.C.P., the allegations of paragraph VIII of the foregoing form of complaint should be amended accordingly. The following amendment is suggested:

Plaintiff is informed and believes, and on such information and belief alleges that on the——day of——, 19——, there was due and to become due to the said defendant *Wm. Raynard*, from the defendant *E. J. Jenicki*, under the said contract between them, the sum of \$——and upwards; that on said last mentioned date the plaintiff gave to the said defendant *Jenicki* a written notice that it had furnished materials unto the said defendant *Raynard*, which notice stated in general terms the kind of materials furnished by plaintiff, to wit, the kind of materials hereinbefore mentioned, and the name of the person to or for whom the same were furnished, to wit, the name of said defendant *Wm. Raynard*, and the amount in value of that already furnished, and of the whole agreed to be furnished, to wit, the sum of \$——, which notice was given by delivering the same to the said defendant *Jenicki*. (Or by delivering it to his architects, etc.)

Plaintiff is informed and believes, and upon such information and belief alleges that the sum of \$—— is still due and unpaid from the said defendant *Jenicki* to the said contractor *Wm. Raynard* on account of said contract price, and applicable to the lien of plaintiff herein referred to.

Form No. 13.

NOTICE OF ACTION.

In the Superior Court of the county of *Los Angeles*, state of California.

Richard Davis,

Plaintiff,

vs.

Harry Last, James First and John Doe,

Defendants.

Notice is hereby given that an action has been commenced in the Superior Court of the county of *Los Angeles*, state of California, by the above named *plaintiff* against the above named *defendants*, for the foreclosure of a mechanic's lien, a claim for which was, on the *25th* day of *April*, 1900, filed for record by *plaintiff* in the office of the county recorder of *said* county of *Los Angeles*, and recorded by said recorder in book 287 of mechanic's liens, at page 432, and that the property subject to said lien, described in said complaint and affected by this suit, is a *two-story frame dwelling house* and the *lot* or *parcel* of land upon which the same is situated, which said *lot* or *parcel* of land is situated in the *city* of *Los Angeles*, county of *Los Angeles*, state of California, and described as follows, to wit:

[Insert Description of Lot.]

Perry Williams,

Attorney for Plaintiff.

Dated *May 15th*, 1900.

Form No. 14.

[TITLE OF COURT AND CONSOLIDATED CAUSES.]

FINDINGS IN CONSOLIDATED SUITS.

The above entitled *causes* came on regularly for trial on July 2nd, 1897, before the court, *sitting without a jury*, all parties having waived a jury trial, Borden & Carhart appeared for the plaintiffs Orlandi & Jones; Wallace & Freeman appeared for the plaintiff L. J. Hayne; John S. Chapman appeared as the attorney for the defendant Mrs. C. M. Gray; Hanna & Davis appeared as the attorneys for the defendants John Pugh & Sons, and no one appeared on behalf of the defendant L. J. B. Bourgeois; thereupon the court made an order consolidating the said actions and ordering that they be tried together and proceeded to the trial of said actions; and witnesses were sworn and examined, and evidence, oral and documentary introduced on behalf of the respective parties, the consolidated case was closed and continued for argument; and thereafter the said *causes* having been duly argued orally and in writing the same were submitted to the court for decision, and the court having considered the evidence and the arguments of the counsel, now makes the following findings of fact and conclusions of law therein, to wit:

From the evidence and facts admitted by the pleadings the court finds:

I. .

* * * * *

CONCLUSIONS OF LAW.

And as conclusion of law from the foregoing facts the court finds that the *plaintiffs* are entitled to judgment as follows:

1st. Plaintiffs, Orlandi & Jones, are entitled to judgment against the *defendants, Pugh & Sons*, for the sum of \$270, with interest thereon at the rate of 7 per cent. per annum from the 14th day of Jan., 1897, and for the further sum of \$2.00, paid by *them* for verifying and recording *their* said claim of lien and for the further sum of \$100 attorneys' fee in said action, and for *their* costs herein.

2nd. Plaintiff, L. J. Hayne, is entitled to judgment against the *defendant, L. J. B Bourgeois*, for the sum of \$186, with interest thereon at the rate of 7 per cent. per annum, from the 19th day of Jan , 1897, and for the further sum of \$1.80, paid by him for verifying and recording his said claim of lien and for the further sum of \$50 attorneys' fee in said action and for *his* costs incurred herein.

3rd. That plaintiffs are entitled to enforce *liens* upon the real property described in the *complaints* herein, for the said *sums* found due *them respectively*, and that said *liens* are superior and paramount to the interest and claims of *all the defendants* herein.

Let a decree be entered accordingly.

Dated Sept. 30th, 1897.

M. T. Allen,
Judge of the Superior Court.

Form No. 15.

[TITLE OF COURT AND CONSOLIDATED CAUSES.]

DECREE IN CONSOLIDATED SUITS.

The above entitled *causes* came on regularly for trial on the 2nd day of July, 1897, before the court sitting without a jury, all parties having waived a jury trial, *Borden & Carhart* appeared for the plaintiffs, *Orlandi & Jones*; *Wallace & Freeman* appeared for the plaintiff, *L. J. Hayne*; *John S. Chapman* appeared as the attorney for the defendant, *Mrs. C. M. Gray*; *Hanna & Davis* appeared as the attorneys for the defendants, *John Pugh & Sons*; thereupon the court made an order consolidating the said actions and ordering that they be tried together and proceeded to the trial of said actions, and the said actions having been tried, argued and submitted to the court for decision and the court having decided the same and made and filed its findings of fact and conclusions of law, wherein a decree is ordered for the plaintiff, as therein set forth:

Now, therefore, on motion of counsel for the respective plaintiffs, it is hereby ordered, adjudged and decreed:

1st. That the plaintiffs, *C. Orlandi and W. Jones*, co-partners under the firm name and style of *Orlandi & Jones*, have judgment against the defendants, *John Pugh, W. T. Pugh and T. W. Pugh*, co-partners as *Pugh & Sons* for the sum of \$270 with interest thereon at the rate of seven per cent. per annum, from the 4th day of Jan., 1897, and for the further sum of \$2.00, paid by said plaintiffs for verifying and record-

ing *their* claim of lien, and for the further sum of \$100, attorneys' fees allowed said *plaintiffs*, and for *their* costs herein taxed at \$———

2nd. That plaintiff, *L. J. Hayne*, have judgment against the defendant, *L. J. B. Bourgeois*, for the sum of \$186, with interest thereon at the rate of *seven* per cent. per annum, from the 19th day of *January, 1897*, and for the further sum of \$1.80 paid by said *plaintiff* for verifying and recording *his* claim of lien, and for the further sum of \$50 attorneys' fees allowed said plaintiff, and for *his* costs herein taxed at \$———

3rd. That said *plaintiffs, Orlandi & Jones and L. J. Hayne*, have liens upon the real property hereinafter described, for the payment of the said several sums found due them respectively.

4th. That said liens be foreclosed and that all and singular the real property hereinafter described or so much thereof as may be sufficient to raise the said several sums due said *plaintiffs* as aforesaid, for principal, interest, attorneys' fees, costs of suit and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by the sheriff of *Los Angeles* county in the manner prescribed by law, and according to the course and practice of this court, and that the said sheriff, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the said real property on the said sale.

That the said sheriff, out of the proceeds of said sale, retain his fees, disbursements and commissions on said sale, and pay to the said *plaintiffs*, or *their attorneys*, out of the said proceeds, the aforesaid sums found due them respectively all in *gold coin* of the United States, or so much thereof as the said proceeds will pay for the same.

That the *defendants*, *Mrs. Catherine M. Gray, L. J. B. Bourgeois, John Pugh, W. T. Pugh and T. W. Pugh*, and all persons claiming from or under them, or either of them, and all persons having liens subsequent to the liens of the said *plaintiffs* by judgment or decree upon the real property hereinafter described, and all persons having any claim or lien by or under such subsequent judgment or decree, and their heirs or personal representatives, be forever barred and foreclosed of and from all equity of redemption and claim, of, in and to the said real property, from and after the delivery of the said sheriff's deed.

That the purchaser or purchasers of said real property, at such sale, be let into the possession thereof on production of the sheriff's deed therefor.

That if the moneys realized from said sale shall be insufficient to pay the amounts so found due to the *respective plaintiffs* as above stated, with interest, attorneys' fees, costs and expenses of sale, as aforesaid, the sheriff specify the amount of such deficiency and balance due to each of the said plaintiffs respectively, in his return of said sale, and that on the coming in and filing of said return, the clerk of this court docket a judgment against the defendants *John Pugh, W. T. Pugh and T. W. Pugh* for the amount of any deficiency which may remain unpaid upon the judgment of the plaintiffs *Orlandi & Jones*, and against the defendant *L. J. B. Bourgeois*, for any deficiency which may remain unpaid upon the judgment of the plaintiff *L. J. Hayne*, and that the said defendants, respectively, pay unto the said respective plaintiffs the amount of such deficiency and judgment with interest thereon at the rate of seven per cent. per annum from the date of said return and judg-

ment, and that the said *plaintiffs, respectively*, have execution against the said *defendants, respectively*, for the amount thereof.

The real property directed to be sold by this decree is situated in the *city of Los Angeles*, county of *Los Angeles*, state of California, and bounded and particularly described as follows, to wit:

The lots numbered (2) and three (3) of the Mayo tract, situated on the northeast corner of Main and Third streets, in the said city of Los Angeles, according to the map of the said Mayo tract, recorded in the office of the county recorder of Los Angeles county, in volume 100 of deeds, at page 201.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Done in open court the *30th* day of *Sept., 1897*.

M. T. Allen,

Judge of the Superior Court.

Form No. 16.**RELEASE OF LIEN.**

Know all men by these presents: That *I, Richard Davis*, of the county of *Los Angeles*, state of California, do hereby certify and declare that that certain mechanic's lien filed by *me* for record in the office of the county recorder of *Los Angeles county*, state of California, on the *25th* day of *April*, *1900*, and recorded in said recorder's office in book *287* of mechanic's liens, at page *432*, together with the demand of *four hundred dollars and interest* thereby secured, is fully paid, satisfied and discharged.

Richard Davis.

Signed, sealed and delivered in the presence of

Jacob Jones.

State of California, }
County of *Los Angeles.* } ss.

On this *10th* day of *May*, A. D. *1900*, before me, *C. W. Chase*, a notary public in and for said county of *Los Angeles*, state of California, residing therein, duly commissioned and sworn, personally appeared *Richard Davis*, known to me to be the *person* whose *name* is subscribed to the foregoing release of lien, and *he* acknowledged that *he* executed the same.

[*Notarial Seal*]

C. W. Chase,

Notary Public in and for said County.

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(The figures in parenthesis refer to sections of the statute; those in the right hand column, to the sections of this volume.)

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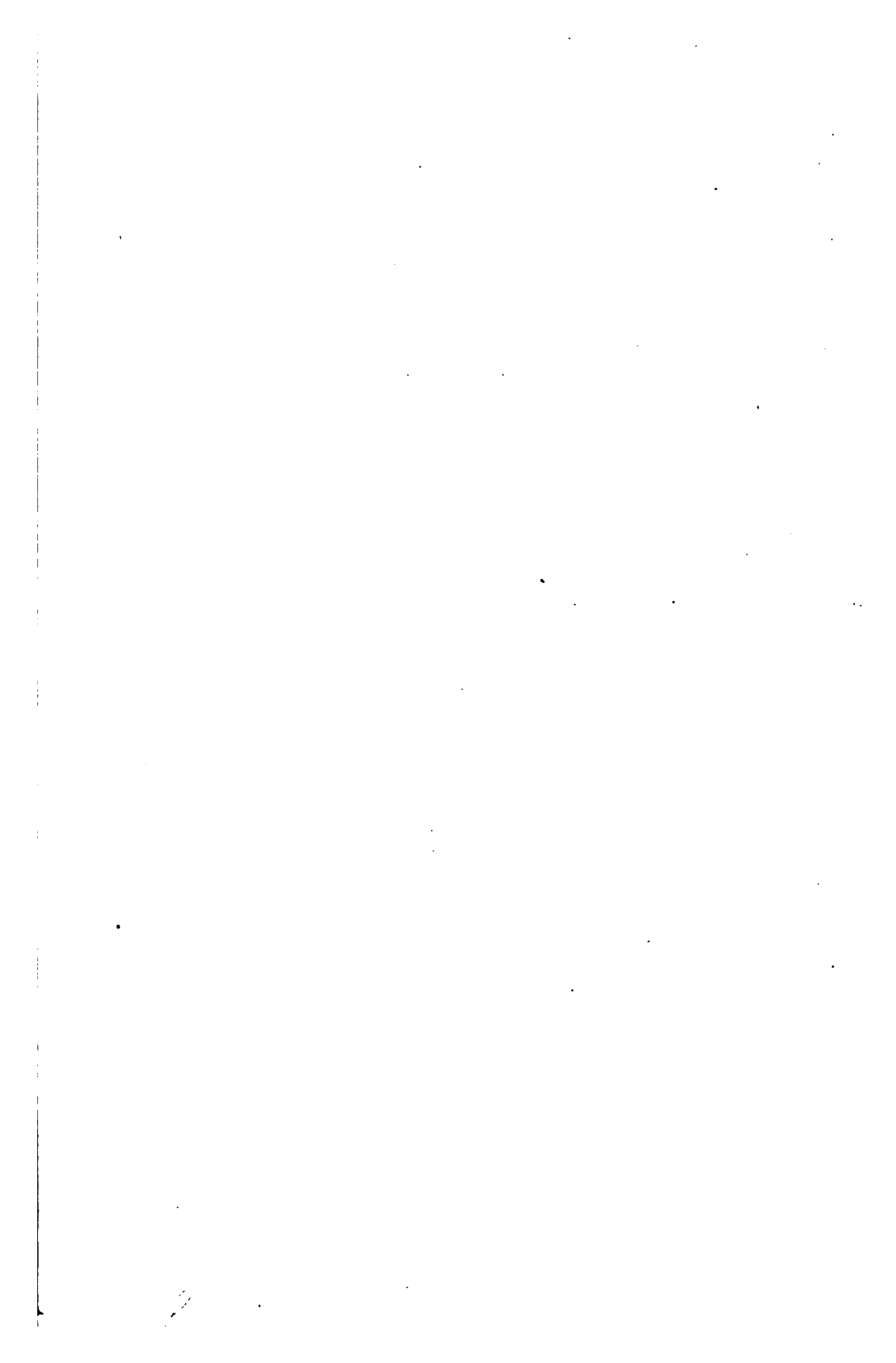
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